86-1366

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DUQUESNE LIGHT COMPANY, OHIO POWER COMPANY, WEST PENN POWER COMPANY, APPALACHIAN POWER COMPANY, MONONGAHELA POWER COMPANY, THE POTOMAC EDISON COMPANY, and VIRGINIA ELECTRIC AND POWER COMPANY, *Appellants*,

v.

STATE TAX DEPARTMENT OF WEST VIRGINIA and MICHAEL E. CARYL, STATE TAX COMMISSIONER OF WEST VIRGINIA,

Appellees.

On Appeal from the Supreme Court of Appeals of West Virginia

JURISDICTIONAL STATEMENT

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February 17, 1987

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QUESTIONS PRESENTED

1. Does West Virginia Code § 11-13-2m (1978) which taxes the manufacture or production of electricity in West Virginia when that electricity is exported to other states violate 15 U.S.C. § 391 under the principles of *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979) because it is not an evenhanded tax on all generation of electricity within West Virginia?

2. Does the West Virginia tax on the manufacture of electricity violate the Commerce Clause under the principles of *Armco v. Hardesty*, 467 U.S. 638 (1984) because electricity manufactured in West Virginia and sold in another state bears both West Virginia's manufacturing tax and the other state's tax on sales, whereas electricity manufactured and sold in West Virginia bears only the West Virginia tax on sales?

3. Does the West Virginia tax on the manufacture of electricity violate the Equal Protection Clause under the principles of *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985), because it favors West Virginia residents at the expense of out-of-state residents?

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

All of the parties in the Supreme Court of Appeals of West Virginia are listed in the caption of this case. Their corporate relationships are as follow:

Duquesne Light Company

Duquesne Light Company does not have an ownership interest in any subsidiaries (excepting wholly owned subsidiaries) and is not affiliated with any companies.

Virginia Electric and Power Company (VEPCO)

Virginia Electric and Power Company, doing business as Virginia Power, North Carolina Power, and West Virginia Power is wholly owned by Dominion Resources, Inc., and is affiliated with Virginia Natural Gas, Inc., Dominion Land, Inc., Dominion Capital, Inc., Dominion Exploration, Inc., and Rincon Securities, Inc.

Virginia Electric and Power Company does not have an ownership interest in any other subsidiaries (excepting only wholly owned subsidiaries).

West Penn Power Company, Potomac Edison Company and Monongahela Power Company

These three companies are affiliated companies and are all owned by Allegheny Power System, Inc., New York, NY 10022.

They have an ownership interest in the following subsidiaries:

Allegheny Generating Company
Allegheny Pittsburgh Coal Company

They are members of the Affiliated Group, Allegheny Power System, Inc., and Affiliated Companies, which is composed of the following:

Allegheny Generating Company
Allegheny Pittsburgh Coal Company
Allegheny Power Service Corporation
Allegheny Power System, Inc.
Monongahela Power Company
The Potomac Edison Company
West Penn West Virginia Water Power Company
West Virginia Power and Transmission Company

Ohio Power Company and
Appalachian Power Company

Appalachian Power Company and Ohio Power Company are subsidiaries of American Electric Power Company, Inc.

The following companies are affiliates of Appalachian Power Company and Ohio Power Company:

American Electric Power Service Corporation
AEP Energy Services, Inc.
AEP Generating Company
Cedar Coal Co.
Central Appalachian Coal Company
Kanawha Valley Power Company
Southern Appalachian Coal Company
West Virginia Power Company
Columbus and Southern Ohio Electric Company
Colomet, Inc.
Conesville Coal Preparation Company, Inc.
Simco Inc.
Franklin Real Estate Company
Indiana Franklin Realty, Inc.
Indiana & Michigan Electric Company
Blackhawk Coal Company
Price River Coal Co.
Kentucky Power Company
Kingsport Power Company
Michigan Electric Power Company
Michigan Power Company

Michigan Gas Exploration Co.
Cardinal Operating Company
Central Coal Company
Central Ohio Coal Company
Central Operating Company
Southern Ohio Coal Company
Windsor Power House Coal Company
Ohio Valley Electric Corporation
Indiana-Kentucky Electric Corporation
Twin Branch Railroad Company
Wheeling Electric Company

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DUQUESNE LIGHT COMPANY, OHIO POWER COMPANY, WEST PENN POWER COMPANY, APPALACHIAN POWER COMPANY, MONONGAHELA POWER COMPANY, THE POTOMAC EDISON COMPANY, and VIRGINIA ELECTRIC AND POWER COMPANY, *Appellants,*

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STATE TAX DEPARTMENT OF WEST VIRGINIA and MICHAEL E. CARYL, STATE TAX COMMISSIONER OF WEST VIRGINIA,

Appellees.

On Appeal from the Supreme Court of Appeals of West Virginia

JURISDICTIONAL STATEMENT

Appellants, Duquesne Light Company, Ohio Power Company, West Penn Power Company, Appalachian Power Company, Monongahela Power Company, The Potomac Edison Company and Virginia Electric and Power Company appeal from the decision of the Supreme Court of Appeals of West Virginia rendered in this case on November 20, 1986, sustaining the validity of the tax imposed by West Virginia on the privilege of manufacturing electricity within West Virginia. This jurisdic-

tional statement is submitted to show that this Court has jurisdiction over this appeal and that substantial federal questions are presented.

OPINIONS BELOW

This case has been reviewed twice by the West Virginia Supreme Court of Appeals. The opinion of the West Virginia Supreme Court of Appeals entered on November 20, 1986 (Appendix C, *infra*, 6a-18a), is reported at 350 S.E.2d 754 (W.Va. 1986). That court's prior opinion entered on November 14, 1984 (Appendix H, *infra*, 28a-44a), is reported at 327 S.E.2d 683 (W.Va. 1984), and this Court's April 15, 1985, denial of appellants' Petition for Certiorari seeking an interlocutory appeal of that remand is reported at —— U.S. ——, 105 S. Ct. 2040 (1985) (Appendix E, *infra*, 24a). The initial decision of the Circuit Court of Kanawha County, West Virginia, holding the challenged tax invalid (Appendix I, *infra*, 45a-49a), and that court's decision following remand holding the tax valid (Appendix D, *infra*, 19a-23a) are not officially reported.

JURISDICTION

The West Virginia Supreme Court of Appeals issued its opinion and final order on November 20, 1986, holding that the tax imposed by West Virginia Code § 11-13-2m did not violate the Commerce Clause or the Equal Protection Clause of the United States Constitution, and reaffirmed its earlier reversal of the initial ruling of the Circuit Court that West Virginia Code § 11-13-2m violated Section 2121(a) of the Tax Reform Act of 1976 (15 U.S.C. § 391). No petition for rehearing was filed. A Notice of Appeal (Appendix A, *infra*, 1a) was timely filed with the West Virginia Supreme Court of Appeals on February 2, 1987. The time within which to docket this appeal in this Court expires on February 18, 1987, and timely docketing has been made. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, art. I, § 8, cl. 3 (the Commerce Clause)

United States Constitution, art. VI, cl. 2 (the Supremacy Clause)

United States Constitution, amend. XIV, § 1, cl. 4 (the Equal Protection Clause)

Tax Reform Act of 1976, Section 2121(a), 15 U.S.C. § 391

West Virginia Code § 11-13-2b

West Virginia Code § 11-13-2d

West Virginia Code § 11-13-2m

The text of each citation appears at Appendix K, *infra*, 52a-56a.

STATEMENT OF THE CASE

1. *Proceedings Below, Federal Question Raised*

Appellants challenge the validity of the business and occupation tax imposed by West Virginia Code § 11-13-2m [1] upon those engaged in the business of generating or producing electric power within that State. Appellants contend this tax discriminates against out-of-state consumers because the tax applies only to West Virginia generation or manufacture which is transmitted out of

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[1] Section 2m provides, in part, that there shall be a tax:

> (1) Upon every person engaging or continuing within this state in the business of generating or producing electric power for sale, profit or commercial use, either directly or through the activity of others, in whole or in part, *when the sale thereof is not subject to tax under section two-d of this article*, the amount of the tax to be equal to the value of the electric power, as shown by the gross proceeds derived from the sale thereof by the generator or producer of the same multiplied by a rate * * * (Emphasis supplied).

state. Appellants seek to have the tax which is imposed upon their generating activities within the State of West Virginia declared invalid under the Supremacy Clause of the United States Constitution as violative of Section 2121(a) of the Tax Reform Act of 1976 (90 Stat. 1914, codified at 15 U.S.C. § 391), the Commerce Clause, and the Equal Protection Clause of the United States Constitution.

Each appellant is engaged in the manufacture of electricity in West Virginia and owns generating facilities in that State. Each appellant sells to customers in other states at least some portion of the electricity manufactured by it at its West Virginia facilities. Since 1978 West Virginia has imposed a tax upon the privilege of manufacturing electricity in West Virginia under a statute which exempts from the tax the manufacture of electricity sold by the manufacturer as a public utility in West Virginia. Electricity generated by persons using it in another business of manufacturing taxed under Section 2b is also exempt from the tax. West Virginia has imposed the tax against each appellant based upon its manufacture within West Virginia of electricity in excess of the electricity used to conduct its public utility business in West Virginia, if any. That tax has been paid by appellants under protest and subject to refund pending a final decision on their judicial challenge to the tax.

Appellants filed a declaratory judgment action in the Circuit Court of Kanawha County, West Virginia, seeking a determination that the tax is "invalid, unenforceable and void for the reason that it violates the statutes and Constitution of the United States." The circuit court heard and decided the case upon a stipulation of facts and declared the tax imposed upon those engaged in the manufacture of electricity in West Virginia "invalid and unenforceable because it violates 15 U.S.C. § 391," citing this Court's opinion in *Arizona Public Service Co. v.*

Snead, 441 U.S. 141 (1979), and Note, *West Virginia Generation of Electricity Tax: Is It Valid After Snead?*, 83 W.Va. L. Rev. 79 (1981) (Appendix I, *infra*, 46a). The West Virginia Supreme Court of Appeals reversed the decision of the circuit court, held that the tax "does not violate the provisions of 15 U.S.C. § 391," and remanded to the circuit court the question "whether the statute violates the Commerce and Equal Protection Clauses of the United States Constitution," a question which the circuit court had found unnecessary to decide because of its conclusion that the tax was invalid on federal statutory grounds. 327 S.E.2d at 688. Appellants filed a Petition for Rehearing wherein they sought a decision on the federal constitutional issues without a remand because the facts had been stipulated and because the federal constitutional issues had been fully briefed and argued on appeal. The Petition for Rehearing was denied (Appendix F, *infra*, 25a). Appellants filed a Petition for a Writ of Certiorari on February 21, 1985, seeking to invoke the jurisdiction of the Court under the doctrine announced in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), despite the pendency of further proceedings in state court. The petition was denied by this Court without opinion (Appendix E, *infra*, 24a). —— U.S. ——, 105 S. Ct. 2040 (1985).

On remand the Circuit Court of Kanawha County held the challenged provisions of the state tax law "do not violate the Commerce Clause or the Equal Protection Clause of the United States Constitution" and denied relief to appellants (Appendix D, *infra*, 22a). That decision was appealed to the West Virginia Supreme Court of Appeals by a petition which also sought reconsideration by that court of its earlier ruling on the issues raised under the Tax Reform Act of 1976. The West Virginia Supreme Court of Appeals issued an opinion and final order in which it elected to "stand by [its] earlier opinion" that

the tax did not violate the Tax Reform Act of 1976. 350 S.E.2d at 756. The court also affirmed the decision of the Circuit Court of Kanawha County on the constitutional issues and held "W. Va. Code § 11-13-2m [1978], which taxes the production of electric power in West Virginia, when that power is exported to other states, is constitutional under the commerce, due process and equal protection clauses of the Constitution of the United States. . . ." 350 S.E.2d at 755 (Syllabus by the Court). No petition for rehearing was filed.

2. *Statement of Facts*

On March 11, 1978, the West Virginia Legislature passed the Committee Substitute for Senate Bill No. 163 (Acts of the West Virginia Legislature, 1978, Chapter 96) (Appendix L, *infra*, 57a-66a) which became effective April 1, 1978. Prior to this change in law, appellants were subject to a 0.88% manufacturing tax applicable to all West Virginia manufacturers pursuant to West Virginia Code § 11-13-2b. The amended law taxed the manufacture of electricity under a new section, West Virginia Code § 11-13-2m, (hereinafter referred to as the manufacturing tax), at the rate of 4.0%. However, the generation of electricity in West Virginia by a West Virginia utility which is sold to its West Virginia customers is expressly exempt from the manufacturing tax. Persons engaged in the public utility business in West Virginia are taxed pursuant to West Virginia Code § 11-13-2d (a tax measured by public utility sales and hereafter referred to as the tax on sales) at a rate of 4.0%, which is a reduction of the previously imposed rates of 5.72% or 4.29%. Electric light and power companies which engage in the public utility business in West Virginia but do not generate electricity are taxed on sales at a rate of 3.0%. Both the manufacturing tax and the tax on sales provide for a reduced rate of taxation for consumption above specified levels.

Each appellant is authorized to do business in West Virginia and owns facilities for the generation of electricity in West Virginia. Each appellant is a public utility in one or more states, and the rates charged to its customers in each state are fixed or approved, and the method of its accounting is prescribed, by regulatory commissions of those states. Appellants Duquesne, Ohio Power and West Penn do not engage in the public utility business in West Virginia, and all electricity generated by them within West Virginia is subject to the manufacturing tax at the 4% rate. Appellants Appalachian, Monongahela, Potomac Edison and VEPCO engage in both the business of manufacturing electricity for export and in the public utility business in West Virginia and are, therefore, subject to both the manufacturing tax and the tax on sales. In order to calculate the tax liability of those appellants which are subject to both the tax on sales and the manufacturing tax, an agreed upon method of reporting referred to as the "VEPCO Formula" is applied. Under the VEPCO formula, the manufacturing tax is calculated on the value of the electricity at the place of manufacture rather than upon the statutory measure of the gross proceeds of sale in order to avoid a violation of the Commerce Clause by using interstate gross sales receipts as a tax measure. The value of the electricity is determined by the cost of manufacture plus a rate of return on invested capital, and the amount of electricity subject to the tax is determined by subtracting from net station generation the kilowatt-hours used by the taxpayer to conduct its utility business in its West Virginia service area.

Immediately following enactment of the tax challenged in this proceeding, the West Virginia Public Service Commission entered an order reducing the authorized rate chargeable to West Virginia public utility customers to reflect the reduction of the rate of the tax on sales from 5.72% or 4.29% to 4.0%. The rate of the manufacturing tax was increased from 0.88% to 4.0%, and appel-

lants have included the manufacturing tax, with the approval of the regulatory commissions having jurisdiction of sales made by them outside West Virginia, as a cost of service to customers outside West Virginia.

In 1979 appellants' liability for the tax on sales to their West Virginia public utility customers was $22,602,139, which represented a decrease of $5,203,606 from the amount which would have been payable under the old tax tystem. During that same year appellants' liability for manufacturing tax on the generation of electricity in West Virginia was $39,669,506, which represented an increase of $30,523,994 over the amount which would have been paid under the old tax system. The shift of the tax burden by West Virginia to out-of-state consumers is evident. Although West Virginia exempts from the manufacturing tax the generation of electricity sold to West Virginia public utility customers which is subject to the West Virginia tax on sales, no similar exemption exists with respect to electricity sold to public utility customers in other states subject to a tax on sales in those states. The record reflects that each state in which appellants operate imposes a gross receipts tax similar to the West Virginia tax on sales so that consumers in those states bear a double tax burden, whereas West Virginia has assured its consumers will bear only a single tax burden

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This case presents substantial federal questions as to the power of the states to impose taxes that (a) are prohibited by Congress or (b) impose greater burdens on companies and customers outside of the taxing state than those within the state. These are matters of important national policy and constitutional doctrine. The tax imposed by West Virginia upon the manufacture of electricity is not an evenhanded tax on all generation since the manufacture of electricity sold to public utility customers within West Virginia is excluded from the burden of the tax. The national policy expressed by Con-

gress in Section 2121(a) Tax Reform Act of 1976 clearly prohibits the sort of tax discrimination against electricity sold in interstate commerce that West Virginia has imposed. Since the tax on generating electricity in West Virginia is determined by whether the electricity is consumed in West Virginia or in interstate commerce, the tax also violates the Commerce Clause and the Equal Protection Clause. The decision of the West Virginia Supreme Court of Appeals upholding the tax is in irreconciliable conflict with this Court's opinions in *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979), *Armco v. Hardesty*, 467 U.S. 638 (1984) and *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985).

Every taxing jurisdiction welcomes opportunities to impose its costs upon persons other than the voters within that jurisdiction. West Virginia has found a means of doing this through its discriminatory tax on generating electricity. Such shifting of tax burdens across governmental boundaries should be discouraged and prohibited. Failure by this Court to consider this appeal would, however, encourage such shifting of tax burdens, not only for electric utilities but other businesses as well. The question presented by this appeal is, therefore, of substantial importance. Review by this Court is necessary to assure that congressional policy on the taxation of electricity is being followed and to establish appropriate constitutional standards governing the taxation of interstate business activity.

I. THE DECISION BELOW FRUSTRATES THE IMPORTANT FEDERAL POLICY EXPRESSED BY CONGRESS IN ENACTING SECTION 2121(a) OF THE TAX REFORM ACT OF 1976 AND IS CONTRARY TO THE HOLDING OF THIS COURT IN *ARIZONA PUBLIC SERVICE CO. v. SNEAD*, 441 U.S. 141 (1979).

The decision of the court below which permits West Virginia to shield its own citizens from the tax it imposes on the manufacture of electric power within that

state so as to shift the burden of the tax solely to residents of other states frustrates the important federal policy expressed by Congress in enacting Section 2121(a) of the Tax Reform Act of 1976, 15 U.S.C. § 391. That Section provides:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section, a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

West Virginia's Section 2m manufacturing or generating tax is invalid under the literal wording of this statute. The West Virginia statute expressly states that it is a tax upon those engaged "in the business of generating or producing electric power," and, therefore, it is "a tax on or with respect to the generation or transmission of electricity" within the meaning of the federal statute quoted above. The tax must, therefore, be declared invalid if found to impose "a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce."

There can be no question as to whether the Section 2m manufacturing tax imposes a greater tax burden on electricity in interstate commerce than in intrastate commerce. It is applicable only to interstate commerce, not to intrastate commerce. Utilities generating power and selling that power to consumers in West Virginia do not pay the manufacturing tax, while utilities generating electricity in West Virginia and selling in another state pay the tax. As a consequence, the in-state consumer on one side of the state line pays no tax under Section 2m

while his interstate neighbor on the other side of the line in Ohio, Virginia, Maryland or Pennsylvania pays a 4% tax.

The court below acknowledged that Section 2m "relates only to in-state generation or manufacture which is transmitted out of state," but held the tax did not violate 15 U.S.C. § 391 by reading the Section 2d tax on sales as equivalent to the Section 2m tax on generating. *Duquesne Light Co. v. State Tax Department*, 327 S.E.2d 683, 688 (W.Va. 1984). In so holding, the court below failed to apply the principle announced in *Snead* that one must focus specifically on the type of tax named in the statute—a tax on generation or transmission—rather than on "the entire tax structure of the State." 441 U.S. at 150.

In *Snead*, New Mexico taxed all in-state generation of electricity at the rate of 4/10 of a mill per kilowatt-hour generated which this Court equated to a tax of 2% of the retail value of electricity. Those generating companies which sold electricity in New Mexico could credit the 2% generation tax against the 4% gross receipts tax on in-state sales. Generators selling out-of-state did not receive the credit. Thus they paid the full 2% on generation. New Mexico argued that any apparent discrimination disappeared when the generation tax was considered with the tax on in-state sales. It argued that there was no discriminatory tax burden, because electricity consumed in-state was taxed by New Mexico at 4% whereas electricity consumed out-of-state was taxed by New Mexico at only 2%. 441 U.S. at 149.

This Court rejected New Mexico's position that its two taxes, one on generation and one on sales, should be considered as one.

> *[T]he federal statutory provision is directed specifically at a state tax "on or with respect to the generation or transmission of electricity," not to the*

> *entire tax structure of the State.* The tax imposed by New Mexico's Electrical Energy Tax Act is concededly a tax on the generation of electricity. The tax-credit provisions of the Act itself insure that locally consumed electricity is subject to *no* [original emphasis] tax burden from the electrical energy tax, while the bulk of the electricity generated in New Mexico by the appellants is subject to a 2% tax, since it is sold outside the State. *To look narrowly to the type of tax the federal statute names, rather than to consider the entire tax structure of the State, is to be faithful not only to the language of that statute but also to the expressed intent of Congress in enacting it.* Because the electrical energy tax *itself* [original emphasis] indirectly but necessarily discriminates against electricity sold outside New Mexico, it violates the federal statute.

441 U.S. at 149-50 (Emphasis added) (footnote omitted).

The New Mexico tax on generation was held invalid. 441 U.S. at 150. The fact that the state's tax on sales to residents was higher than its tax on power generated for sale to nonresidents was irrelevant.

The very arguments rejected by this Court in *Snead* were relied on by the West Virginia Supreme Court of Appeals to uphold the manufacturing or generation tax at issue here. Like New Mexico, West Virginia argued that its Section 2m manufacturing tax should be considered as one with its Section 2d tax on sales. *Duquesne Light Co.*, 327 S.E.2d 683, 688; *Duquesne Light Co.*, 350 S.E.2d 754, 757. Like New Mexico, West Virginia argued that the tax on generation is valid because the tax on sales in West Virginia is higher. *Id.* Just as New Mexico's generation tax was invalid, so too is West Virginia's. Although the form of the two states' taxes is slightly different, the economic results are identical. In-state residents pay a tax on sales, but only non-residents bear the burden of the generation tax.

There is no material difference between the credit mechanism which shielded New Mexico consumers from the burden of the generation tax struck down in *Snead* and the express statutory exclusion which shields West Virginia consumers from the burden of the Section 2m manufacturing tax in this case. The Section 2d tax on sales, which the court below held imposes a burden upon West Virginia residents equivalent to the burden imposed on out-of-state residents by the manufacturing tax, is identical to the New Mexico tax which this Court held in *Snead* could not justify a generation tax borne solely by out-of-state residents. Both the New Mexico gross receipts tax upon retail sellers of electricity and the West Virginia Section 2d tax on sales are measured by receipts from the sale of electricity.

That West Virginia amended its manufacturing tax and tax on sales simultaneously while New Mexico enacted at different times the two taxes analyzed in *Snead* is a distinction without a difference. The West Virginia tax on sales was merely reenacted at a lower rate, and at the same time, as a substitute for the Section 2b manufacturing tax applicable to generating, a new Section 2m manufacturing tax at a higher rate was enacted. Each section applies to a distinct taxable privilege. The West Virginia Court itself recognized that the West Virginia business and occupation tax is composed of a number of separate taxes which are applicable to various and distinct business activities. *Duquesne Light Co.*, 327 S.E.2d 683, 687. The amendment of two sections at one time does not alter the distinct nature of the taxable privileges.

The lower court's ruling that the net effect of the 1978 amendments as a whole "harmonized the tax rate" between domestic and foreign consumers failed to address the fact that the two taxes are imposed upon different events. By its express terms the West Virginia Section 2m manufacturing tax is not "an evenhanded tax on the

generation of electricity." *See Snead*, 441 U.S. at 150 n.7. The Section 2d tax on sales is not imposed on the event of generation, but rather, upon the event of sale. The lower court's justification that the result is to "harmonize" the tax burden on domestic and out-of-state consumers is no different than the "practical result" justification offered by New Mexico and rejected by this Court in *Snead*. *Id.* In each instance the generation tax violates Section 2121(a) of the Tax Reform Act of 1976 because the burden of the tax imposed upon the distinct and isolated event of generation is discriminatory.

The analysis and resulting decision of the court below is in direct conflict with this Court's decision in *Snead* and frustrates the important federal policy expressed by Congress.

II. THE DECISION OF THE COURT BELOW UNDERMINES THE COMMERCE CLAUSE POLICY PROHIBITING DISCRIMINATION AGAINST INTERSTATE COMMERCE AND IS IRRECONCILABLE WITH THIS COURT'S DECISION IN *ARMCO, INC. v. HARDESTY*, 467 U.S. 638 (1984).

The court below refused to apply the Commerce Clause analysis enunciated by this Court in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984). In that case, this Court held that the gross receipts tax upon the sale of tangible personal property imposed by West Virginia Code § 11-13-2c could not be deemed a compensating tax for the manufacturing tax imposed by West Virginia Code § 11-13-2b so as to justify the exemption of West Virginia manufacturers from the tax on sales. This Court made the following analysis with respect to the compensating tax argument:

> The court below was of the view that no such discrimination in favor of local, intrastate commerce occurred because taxpayers manufacturing in the State were subject to a far higher tax of 0.88% of the sale price. This view is mistaken. The gross

> sales tax imposed on Armco cannot be deemed a compensating tax" for the manufacturing tax imposed on its West Virginia competitors. In *Maryland v. Louisiana*, 451 U.S. 725, 758-59 (1981), the Court refused to consider a tax on the first use in Louisiana of gas brought in from out of State to be a complement of a severance tax in the same amount imposed on gas produced in the State. Severance and first use or processing were not "substantially equivalent events[s]" on which compensating taxes might be imposed. *Id.* at 759. Here, too, manufacturing and wholesaling are not "substantially equivalent events" such that the heavy tax on in-state manufacturers can be said to compensate for the admittedly lighter burden placed on wholesalers from out of State. Manufacturing frequently entails selling in the State, but we cannot say which portion of the manufacturing tax is attributable to manufacturing, and which portion to sales."

467 U.S. at 643.

The tax challenged in this case bears the same constitutional infirmity as did the tax struck down in *Armco*. In response to appellants' argument that Section 2m violates the Commerce Clause the court below stated: "Indeed, if *Code* 11-13-2m were the only provision taxing the manufacture of electricity we would agree; however, *Code* 11-13-2m is but one part of a comprehensive, nondiscriminatory, fairly apportioned business and occupation tax." *Duquesne Light Co.*, 350 S.E.2d at 756. The analysis used by the court below in this case to reach its holding that the tax on sales is equivalent to the manufacturing tax is the same analysis that this Court rejected in *Armco*. The taxable event giving rise to the tax on sales is not the manufacture of electric power, but rather the sale of electricity to West Virginia consumers. Thus, an electric utility making sales within West Virginia is taxed at a 4% rate but the rate is reduced to 3% for those electric utilities which do not gen-

erate any of the electric power they sell. Significantly, the 4% rate applies to all public utility sales by an electric utility not eligible for the lower rate, including that portion of its sales attributable to electric power it purchased from others for resale. The taxable events of generation on the one hand and retail public utility sales on the other are not comparable events of taxation, and the tax imposed on domestic public utility sales cannot be characterized as an equivalent to the tax imposed upon the generation for export. *See Maryland v. Louisiana*, 451 U.S. 725 (1981).

If for the purpose of argument (and contrary to the *Armco* standards), it is assumed that some portion of the tax on sales represents a tax on generating electric power, the rate of tax on generating is not 4% as the West Virginia court suggests, but at most 1%. A generating utility pays the tax on sales at the rate of 4%, while a non-generating utility pays the tax on sales at the rate of 3%. Consequently, it is only the 1% difference in rates that could even arguably be attributed to the privilege of generation.

Under the mirror image analysis applied by this Court in *Armco* to test the validity of a state tax under the Commerce Clause, one looks to whether, if the tax being challenged were to be enacted in every other state, the result would be to impose a greater burden on interstate commerce than on intrastate commerce. 467 U.S. at 644. If every state were to adopt West Virginia's tax scheme, electricity manufactured in one state and sold in another state would bear the burden of two 4% taxes, whereas electricity manufactured and sold in the same state would bear the burden of only one 4% tax. By reason of the exemption from the manufacturing tax of electricity generated and sold in the same state, such electricity would bear the single burden of that state's tax on sales. However, interstate sales of electricity would bear the burden of both the manufacturing tax of the

state of generation and the tax on sales of the state of sale. Thus, interstate commerce would bear a double tax burden.

The mirror image test is not purely hypothetical in this case; the record shows that double taxation in fact is precisely the burden borne by the appellants generating in West Virginia and selling out-of-state. Electricity generated by the appellants in West Virginia but transmitted to and sold by them in neighboring states is subject to gross receipts taxes imposed on the utility, and in some states, an additional sales tax also borne by the consumer. The tax rates of the West Virginia Section 2m tax and the gross receipts tax rates of West Virginia and the neighboring states of sale and consumption are as follows:

	Section 2m tax	Tax on Sales
West Virginia	0	4%
Maryland	4%	2%
North Carolina	4%	6%
Ohio	4%	4%
Pennsylvania	4%	4½%
Virginia	4%	3.2/2.9%

Maryland and Virginia consumers of West Virginia generation also bear the burden of the Maryland state and Virginia municipal sales taxes in addition to the state gross receipts tax on sales.

The decision of this Court in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), demonstrates the invalidity of the Section 2m generation tax. Unlike the Section 2m generation tax. Unlike the Section 2m generation tax, the Montana coal severance tax was imposed upon *all* coal mined in Montana and the tax burden was "borne according to the amount of coal consumed and not according to any distinction between in-state and out-of-state consumers." 453 U.S. at 619. West Virginia

does not tax under Section 2m all generation of electric power occurring within West Virginia. The Section 2m tax does discriminate between in-state and out-of-state consumers since the Section 2m tax is not imposed upon generation for West Virginia public utility sales, but is imposed upon generation for public utility sales in other states. The Commerce Clause precludes any state from enacting a tax scheme which so inherently discriminates against interstate commerce. The Section 2m manufacturing tax violates the Commerce Clause under the standards announced by this Court in *Armco* and *Commonwealth Edison.*

III. BY EXEMPTING FROM THE BURDEN OF WEST VIRGINIA'S GENERATION TAX THE GENERATION OF ELECTRICITY SOLD BY PUBLIC UTILITIES TO WEST VIRGINIA RESIDENTS OR CONSUMED BY THE GENERATOR AT A WEST VIRGINIA MANUFACTURING FACILITY, WEST VIRGINIA HAS GRANTED AN ECONOMIC PREFERENCE TO ITS RESIDENTS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE.

The decision of the court below is in conflict with this Court's decision in *Metropolitan Life Insurance Company v. Ward*, 470 U.S. 869 (1985), which applied the Equal Protection Clause as a federal constitutional limitation upon the taxing powers of states. In that case Alabama had imposed a lower gross premium tax on domestic insurance companies (those incorporated in Alabama and maintaining their principal office and chief place of business in that State) than on all other (foreign) insurance companies. A foreign insurance company could reduce the tax differential (which taxed foreign companies at three or four times as much as domestic companies) by making investments in Alabama. This Court held the tax violated the Equal Protection Clause because it was designed to favor domestic industry. "[A] State may not constitutionally favor its own residents by taxing

foreign corporations at a higher rate solely because of their residence." 470 U.S. at 878 (citing cases). This Court invalidated the tax, noting that the Equal Protection Clause "forbids a State to discriminate in favor of its own residents solely by burdening 'the residents of other state members of our federation.'" *Id.* (citing cases).

The principles set forth in *Metropolitan* apply here, and they compel the conclusion that the West Virginia manufacturing tax is invalid on Equal Protection grounds. If a utility generates and sells electricity to its customers within West Virginia, no tax is imposed by West Virginia upon the generation activity under the Section 2m manufacturing tax. A utility generating in West Virginia and selling to its customers in another state, however, pays a 4% generation tax in West Virginia and, in addition, a gross receipts tax in the state of sale. The sole difference is the ultimate point of sale of the electricity which is generated in West Virginia. The Section 2m manufacturing tax discriminates in favor of West Virginia residents "solely by burdening the residents of other state members of our federation." 470 U.S. at 878.

Another application of the Section 2m generating tax violates the Equal Protection Clause. Comparing two manufacturing companies, each of which generates electricity at a West Virginia facility for its own consumption in a manufacturing process, the application of the generating tax depends upon the location of the manufacturer's facility which consumes the electricity so generated. If the manufacturing facility is located in another state, the Section 2m generating tax is imposed; if the manufacturing facility is located within West Virginia, the generation is exempt from the manufacturing tax. This is the result of the exemption set forth in West Virginia Code § 11-13-2b which excludes from the

generating tax the electricity used by the generator at a manufacturing facility located in West Virginia. This effort to force manufacturers who generate their own electric power in West Virginia to also locate their manufacturing business in West Virginia through a discriminatory tax violates the Equal Protection Clause. The "promotion of domestic business by discriminating against nonresident competitors is not a legitimate state purpose." 470 U.S. at 882.

The court below acknowledges in its opinion that the Section 2m manufacturing tax is a tax upon the "production of electric power in West Virginia when that power is exported to other states . . . ." *Duquesne Light Co.*, 350 S.E.2d 754, 755 (Syllabus by the Court). However, the court below seeks to avoid the consequence of its acknowledgement by ruling that the Section 2d tax on sales is also a manufacturing tax imposed at the same rate upon the manufacture and sale of electricity within West Virginia. 350 S.E.2d at 757. The court reasons that since out-of-state consumers and West Virginia consumers pay a tax under complementary sections of the business and occupation tax at the same rate, there is no discrimination. This interpretation is erroneous.

First, this Court has ruled in *Snead* that 15 U.S.C. § 391 is directed specifically to a state tax on or with respect to the generation or transmission of electricity, not to the entire tax structure of the state. Following this standard, the Section 2m manufacturing tax is invalid under the lower court's description of the tax.

Second, this Court has ruled in *Armco*, which also involved the West Virginia business and occupation tax, that a tax on manufacturing and a tax on sales are not taxes on substantially equivalent events.

Third, this Court has also ruled in *Armco* that it could not apportion a tax rate among different taxable events although it was claimed in *Armco* that the higher manufacturing rate included the lower tax rate for selling.

Fourth, an examination of Section 2d shows that it is a tax on the sale of utility services to ultimate consumers of not only electricity, but also gas and water, and that the taxable event is the sale of the utility service, and not the production of the substance sold. The section specifically provides in the last paragraph that the tax measure shall include only gross income from supplying public services, and that gross income received from any other activity shall be included in the tax imposed by other sections.

Fifth, the rate differential in the Section 2d tax on sales of 4% for generating electric utilities and 3% for nongenerating electric utilities establishes, contrary to the lower court's ruling, that the tax on sales is not a 4% tax on the privilege of generating electricity. Assuming that an allocation of tax rates were possible, the most that could be allocated to the taxable privilege of generating, as opposed to selling, would be the rate differential of 1%.

The Section 2m manufacturing tax and the Section 2d tax on sales are not complementary taxes. They are taxes on separate and distinct business privileges, and are imposed on different taxable events. Accordingly, the acknowledgment of the court below that the Section 2m manufacturing tax is a tax upon the production of electric power in West Virginia when the power is exported to other states clearly invalidates the tax under the Equal Protection Clause, as well as 15 U.S.C. § 391 and the Commerce Clause.

CONCLUSION

For the reasons set forth herein, this Court should note probable jurisdiction of this appeal so that the substantial federal questions raised can be given plenary consideration.

Respectfully submitted,

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February 17, 1987

APPENDICES

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APPENDIX A

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 17219

DUQUESNE LIGHT COMPANY,
OHIO POWER COMPANY,
WEST PENN POWER COMPANY,
APPALACHIAN POWER COMPANY,
MONONGAHELA POWER COMPANY,
THE POTOMAC EDISON COMPANY, and
VIRGINIA ELECTRIC and POWER COMPANY,
Plaintiffs Below, Appellants,

v.

STATE TAX DEPARTMENT OF
WEST VIRGINIA and MICHAEL E. CARYL,
State Tax Commissioner of West Virginia,
Defendants Below, Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Duquesne Light Company, Ohio Power Company, West Penn Power Company, Appalachian Power Company, Monongahela Power Company, The Potomac Edison Company and Virginia Electric and Power Company, the appellants named above, hereby appeal to the Supreme Court of the United States from the final order of the Supreme Court of Appeals

of West Virginia, entered in this proceeding on November 20, 1986.

A copy of this Notice will also be filed in the Circuit Court of Kanawha County, West Virginia, inasmuch as the record has been returned from this court to the circuit court.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ Robert E. Magnuson
ROBERT E. MAGNUSON
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Filed with the Clerk of the Supreme Court of Appeals of West Virginia and with the Clerk of the Circuit Court of Kanawha County, West Virginia on February 2, 1987.

AFFIDAVIT OF SERVICE

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, TO-WIT:

I hereby affirm and certify that service of the foregoing Notice of Appeal to the Supreme Court of the United States was made on the only party required to be served by mailing a true copy thereof to Appellees' attorney, Mary Carol Holbert, Assistant Attorney General, addressed to her at the Attorney General's Office, State Capitol, Room W-435, Charleston, West Virginia 25305, in the regular United States mail, postage prepaid, this 2nd day of February, 1987.

/s/ Robert E. Magnuson
ROBERT E. MAGNUSON

Taken, subscribed and sworn to before me, a Notary Public in said county and state, this 2nd day of February, 1987.

My commission expires April 21, 1990.

/s/ Martha R. Goodall
Notary Public
Kanawha County, WV

[NOTARY SEAL]

APPENDIX B

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County on the 20th day of November, 1986, the following order was made and entered, to-wit:

17219

DUQUESNE LIGHT COMPANY,
OHIO POWER COMPANY,
WEST PENN POWER COMPANY,
APPALACHIAN POWER COMPANY,
MONONGAHELA POWER COMPANY,
THE POTOMAC EDISON COMPANY, and
VIRGINIA ELECTRIC and POWER COMPANY,
Plaintiffs Below, Appellants

vs.

STATE TAX DEPARTMENT OF
WEST VIRGINIA and MICHAEL E. CARYL,
State Tax Commissioner of West Virginia,
Defendants Below, Appellees

Upon an appeal from a judgment of the Circuit Court of Kanawha County rendered on the 6th day of December, 1985.

The Court having maturely considered the motion to reverse, the original record filed herein, and the argument and briefs of counsel thereon, is of opinion for reasons stated in writing and filed with the record that there is no error in said judgment. It is therefore con-

sidered and ordered by the Court that the judgment of the Circuit Court of Kanawha County rendered on the 6th day of February, 1985, be, and the same is hereby, affirmed, and that the appellees do recover of and from the appellants their costs about their defense in this Court in this behalf expended, and damages according to law; all of which is ordered to be certified to the Circuit Court of Kanawha County.

The syllabus adjudicated, prefixed to the written opinion prepared by Justice Neely, was concurred in by Chief Justice Miller, and Justices McGraw, McHugh, and Brotherton.

A True Copy

Attest:

/s/ Ancil H. Ramey
Clerk
Supreme Court of Appeals

APPENDIX C

SUPREME COURT OF APPEALS
OF WEST VIRGINIA
KANAWHA COUNTY

No. 17219

DUQUESNE LIGHT CO., *et al.*

v.

STATE TAX DEPARTMENT, *et al.*

Affirmed

[Filed Nov. 20, 1986]

Neely, Justice

Syllabus

W. Va. Code, 11-13-2m [1978], which taxes the production of electric power in West Virginia when that power is exported to other states, is constitutional under the commerce, due process, and equal protection clauses of the *Constitution of the United States* and *W. Va. Const.*, art. X, § 1 because *Code* 11-13-2m [1978] simply complements *W. Va. Code*, 11-13-2d [1978], which taxes the production of electric power for distribution in West Virginia at exactly the same rate.

Neely, Justice:

West Virginia imposes a business and occupation tax upon the privilege of manufacturing, transmitting, and

distributing electric power. *W. Va. Code*, 11-13-2d [1978] taxes electricity generated *and distributed* in West Virginia at the rate of 4 percent, based upon the final sales and demand charges to the consumer. *W. Va. Code*, 11-13-2m [1978] taxes electricity generated in this State for distribution outside West Virginia at the rate of 4 percent based upon the gross sales price.[1] Appellants are electric power companies who manufacture electricity in West Virginia for distribution outside of West Virginia. They sued for a declaratory judgment in the Circuit Court of Kanawha County on the grounds that West Virginia's 2m tax on domestically produced electricity sold in other states discriminates against interstate commerce.

This case was originally before us in 1984. *Duquesne Light Company v. State Tax Department*, —— W. Va. ——, 327 S.E.2d 683 (1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 2040 (1985). In that proceeding we addressed only the question of whether the tax imposed by *Code* 11-13-2m [1978] violates 15 U.S.C. § 391, as interpreted by the Supreme Court in *Arizona Public Service Commission v. Snead*, 441 U.S. 141 (1979).[2] We held then that the West Virginia tax imposed by Section 2m does not violate 15 U.S.C. § 391 as interpreted by the Supreme Court in *Snead*. The Supreme Court declined to grant *certiorari* in that case, and al-

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[1] *W. Va. Code* 11-13-2d [1978] and *W. Va. Code* 11-13-2m [1978] are set forth in their entirety in the appendix to this opinion. The different language used in 2d and 2m, namely a 2d tax on "final sales and demand charges" and a 2m tax on "gross sales price" proceeds from the fact that West Virginia taxes both manufacture and distribution if both occur in-state, but measures the tax by only the value of the power as it leaves West Virginia when power is exported.

[2] 15 U.S.C. § 391 simply prohibits a state or political subdivision from imposing on the generation or transmission of electricity a tax that discriminates against out-of-state users.

though the appellants again urge us to consider 15 U.S.C. § 391 and *Snead*, we stand by our earlier opinion.

However, in the first *Duquesne* case we did not address appellants' general commerce clause objections to West Virginia's 2m tax because the circuit court had held the tax invalid under 15 U.S.C. § 391 and *Snead*. When we reversed the circuit court in the first *Duquesne* case we remanded the case for further development of the commerce clause issues. The circuit court then decided the commerce clause issues against the power companies and they now appeal. The gravamen of their complaint in the lower court and here is that *Code* 11-13-2m [1978] is a specific tax on the privilege of producing electric power for transmission out-of-state and, therefore, discriminates against interstate commerce in violation of the U. S. *Constitution's* commerce clause.

Indeed, if *Code* 11-13-2m were the only provision taxing the manufacture of electricity we would agree; however, *Code* 11-13-2m is but one part of a comprehensive, non-discriminatory, fairly apportioned business and occupation tax. For commerce clause purposes, it is substance and not form that determines a tax's validity. *Complete Auto Transit, Inc., v. Brady*, 430 U.S. 274 (1977). Consequently, we affirm the circuit court.

I

In order to appreciate the validity of West Virginia's 2m tax on the generation of electricity for sale out-of-state, it is necessary to look synoptically at *Code* 11-13-2m [1978] *and Code* 11-13-2d [1978]. Taken together, these two sections tax all electric utilities equally along a continuum that begins with the manufacture of power and ends with its delivery to the consumer. Under the Supreme Court's view of state taxation of interstate commerce, a state tax on "the privilege of doing business" is not *per se* unconstitutional in the absence of a claim "that the activity is not sufficiently connected to

the state to justify a tax, or that the tax is not fairly related to the benefits provided the taxpayers, or that the tax discriminates against interstate commerce, or that the tax is not fairly apportioned." *Complete Auto Transit, Inc., supra.*

Under West Virginia's 2d and 2m taxes the entire process of providing electricity to consumers is taxed, but *only* to the extent that production or distribution occurs in West Virginia. If the whole process from the generation of power to its distribution goes on in West Virginia, then West Virginia taxes manufacture, transmission, and distribution under section 2d. But if only manufacture occurs in West Virginia, West Virginia taxes only manufacture under 2m. Thus the tax is fairly apportioned.[3]

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[3] The appellants also assert that because *Code* 11-13-2d [1978] exempts municipally owned power companies from the payment of the 4 percent utility tax and reduces the tax to 2.46 percent for sales to manufacturing plants purchasing two hundred thousand kilowatts per hour per year there is a violation of *W. Va. Const.* art. X, § 1 and the U.S. *Constitution's* equal protection clause. We find these arguments without merit.

Initially it should be noted that *Code* 11-12-2m [1978] allows the exact exemptions for municipally owned plants selling electricity out-of-state and to utilities supplying out-of-state, high usage manufacturers that are accorded domestic utilities under 2d. Consequently, a power plant in West Virginia selling electricity directly to an out-of-state manufacturer using two hundred thousand kilowatts per hour per year would be taxed the same as an in-state producer/distributor.

W. Va. Const. art. X, § 1 and the U.S. *Constitution's* equal protection clause express similar principles. Although persons in like circumstances must be taxed alike, it is the prerogative of the legislature to classify persons in unlike circumstances and to tax different classes differently. The test of the validity of legislative classifications is whether there is a "rational relationship" between the classification and a valid public purpose. *McGowan v. Maryland*, 366 U.S. 420 (1961); applied specifically in a tax context in *U.S. v. Maryland Savings-Share Insurance Corp.*, 400 U.S. 4 (1970). Certainly there is a valid public purpose in distinguish-

Producers of electricity for distribution inside West Virginia pay a tax of 4 percent on the gross proceeds at the point of final sale. That means that producers of electricity for domestic purposes pay a unified tax under 2d that can be broken down into 4 percent on the value of manufacture, 4 percent on the value of transmission, and 4 percent on the value of distribution. Producers of electricity for out-of-state distribution pay only a 4 percent tax under 2m on the value of manufacture. The reason that West Virginia taxes generation of power for out-of-state consumption under Section 2m and generation for in-state consumption under Section 2d is so that out-of-state producers will *not* pay tax on the value of transmission and distribution activities. The tax on utilities producing for in-state consumption is higher than the tax on utilities producing for out-of-state consumption because West Virginia taxes transmission and distribution activities only if they occur in this State.

As the foregoing discussion demonstrates, Section 2d is a tax on the *manufacture*, transmission and distribution of electric power for public utility sale in West Virginia. Because both Section 2d and Section 2m tax the manufacture of electric power, appellants' contention that the two sections do not tax "substantially equivalent

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ing between ordinary consumers and large commercial users of electricity who provide thousands of jobs in West Virginia or, although located out-of-state, are buying West Virginia power, and can move their plants to locations where their energy needs will not be met by West Virginia power. Furthermore, it is legitimate for the state government to decline to tax the activities of another governmental entity, namely municipally owned power plants. Because it has been conclusively determined that providing power to consumers is a legitimate governmental function, *Puget Sound Power & Light Co. v. Seattle*, 291 U.S. 619 (1934), there is no equal protection problem when government declines to tax itself or another government entity. *Tennessee Power Co. v. T. V. A.*, 306 U.S. 118 (1938).

events," *Armco Inc., v. Hardesty*, 467 U.S. 638 (1984), must fail.[4]

Appellant's primary contention that West Virginia's 2m tax is a specific tax on the privilege of engaging in interstate commerce is entirely without merit. The mere fact that it is easier from the point of view of statutory draftsmanship to create a comprehensive, fairly-apportioned tax structure through the use of separate code sections does not, in and of itself, convert what is in fact a single tax on all manufacturers of electricity into a constitutionally invalid tax on the privilege of engaging in interstate commerce. *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951), which was the high water mark of the triumph of form over substance in interstate commerce tax cases, was overruled by *Complete Auto, supra*, on the specific grounds that in interstate tax cases form should not prevail over substance.

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[4] In *Armco*, the Supreme Court held that a tax of 0.88 percent imposed upon in-state manufacturing could not be deemed a compensatory tax for a 0.27 percent tax on wholesale sales imposed only on out-of-state manufacturers, because manufacturing and wholesale sales were not "substantially equivalent events." In so holding, the Court relied upon the lack of a wholesale sales tax component in the manufacturing tax. The Court stated at 467 U.S. 643:

> The fact that the manufacturing tax is not reduced when a West Virginia manufacturer sells its goods out-of-state, and that it is reduced when part of the manufacturing takes place out-of-state, makes clear that the manufacturing tax is just that, and not in part a proxy for the gross receipts tax imposed on Armco and other sellers from other States.

In *Armco*, the manufacturing tax was not a compensatory tax for the wholesale sales tax because the manufacturing tax contained no demonstrable wholesale sales tax component. In this case, Section 2d *does* contain a demonstrable manufacturing tax (Section 2m) component. The Section 2d tax is imposed on the final sales and demand charges to the consumer, which charges reflect the costs not only of transmission and distribution, but also those of manufacture.

II

West Virginia's overall taxing scheme for producers and distributors of electricity also meets the "mirror image test" announced in *Armco Inc., v. Hardesty, supra,* where the Supreme Court said:

> In *Container Corp. of America v. Franchise Tax Board,* 463 U.S. ——, ——, 103 S.Ct. 2933, 2942, 77 L.Ed.2d 545 (1983), the Court noted that a tax must have "what might be called internal consistency—that is the [tax] must be such that, if applied by every jurisdiction," there would be no impermissible interference with free trade.

467 U.S. at 644. For purposes of Armco's "mirror image" test, it should be noted that Section 2d has a proviso that reduces the electric utility tax from 4 percent to 3 percent on sales and demand charges for domestic purposes when the electricity is produced out-of-state and then imported into West Virginia. The purpose of this reduction is to provide fair tax apportionment when production takes place outside West Virginia but transmission and distribution take place inside West Virginia.[5]

A West Virginia distributor of electric power produced out-of-state might quibble about the precision of the one percent allowance. But as the Supreme Court has said on numerous occasions . . . "we will strike down the application of an apportionment formula if the taxpayer can prove 'by clear and cogent evidence' that the income attributed to the State is in fact 'out of all appropriate proportions to the business transacted . . . in that State' or has 'led to a grossly distorted result.'" *Container*

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[5] None of the appellants argues that part of its business involves the sale in West Virginia of power generated out-of-state and, therefore, no factual record was developed below concerning the proportion that generation bears to total cost for out-of-state producers distributing here.

Corp. of America v. Franchise Tax Bd., 463 U.S. 160 (1983). *See also Norfolk & Western R. Co. v. State Tax Comm'n*, 370 U.S. 317, 326 (1968); *Moorman Mfg. Co. v. Blair*, 437 U.S. 267, 274 (1978). In oral argument before this Court, appellants' counsel was reluctant to stipulate the exact proportion that production cost bears to total cost. Conceivably that was because such a stipulation for tax purposes here might then be binding in future rate submissions before the Public Service Commission.

A company challenging a state's apportionment of business activity has a heavy burden of proving by "clear and cogent" evidence that the apportionment is grossly and flagrantly excessive. *Railway Express Agency v. Virginia*, 347 U.S. 359 (1954). The appellants' position in the lower court was grounded exclusively in tax theory—namely, that West Virginia cannot lawfully impose a separate tax on electrical energy generated for export. Although a company that is paying a 3 percent gross receipts tax on imported power has standing to quarrel with West Virginia's apportionment in that regard, it was stipulated in oral argument that a negligible percentage of all of West Virginia's total power is imported. Thus the precision of the one percent credit for foreign taxes for imported power is largely academic and, in any event, awaits a litigant with standing to challenge it and sufficient interest to develop a detailed factual record.[6]

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[6] One specific example might illuminate the type of factual problem presented by appellants' general allegations that section 2d's 1 percent credit for imported power flunks *Armco's* "mirror image" test. Were we to assume that the cost of manufacturing electricity out-of-state is 25 percent of the cost of that electricity at the point of sale in this State, we find that if every other state had exactly our *Code* 11-13-2d and 2m taxes, there would be perfect symmetry between interstate and intrastate commerce. On a hypothetical $100 of electricity produced and distributed in West Virginia a 2d tax of $4.00 measured by 4 percent of the sales price

III

In *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), the Supreme Court held in circumstances analogous to this case that Montana's coal severance tax is not unconstitutional simply because 80 percent of Montana's coal is shipped out-of-state. Under *Commonwealth Edison*, the test of a tax's constitutional validity is not whether the tax burden falls on out-of-state residents, but whether there is discrimination between interstate and intrastate commerce. Because there is absolutely no discrimination in West Virginia's tax structure, *Commonwealth Edison* is dispositive of the issues in this case.

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at the consumer's meter would be paid to West Virginia. On a hypothetical $100 worth of electricity imported from a foreign state with exactly our tax structure, a 4 percent 2m tax on the value of production would be paid to the foreign state—in this case 4 percent of $25, or $1. West Virginia would then collect a 3 percent, 2d tax on the value of the power delivered to the customer's meter—in this case 3 percent of $100, or $3—which when added to the foreign state's 2m tax would amount to a total tax for both states combined of $4.

Of course, because the issue was not developed below, we cannot determine whether our hypothetical 25 percent of cost attributable to production approximates reality. If it does not, under our own state law of remedies, namely the "doctrine of the least intrusive remedy," the appropriate course is to challenge the validity of the legislature's approximation of the appropriate credit to be allowed for imported power. (*Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) acknowledges the authority of state courts operating under state law to craft appropriate remedies for constitutional imperfections in state tax schemes). Once proving by clear, cogent and convincing evidence, *Railway Express, supra, in text*, that the cost of imported power amounts to substantially more than 25 percent of the cost of power delivered at the customer's meter, a company with standing can ask this court to increase the 2d credit—something that West Virginia's doctrine of the least intrusive remedy allows us to do. *See generally Mauch v. City of Martinsburg*, —— W.Va. ——, 280 S.E.2d 216 at 220; *See* specifically in this context, *Hartstock-Flesher Candy v. Wheeling Wholesale*, —— W.Va. ——, 328 S.E.2d 144 at 151, footnote 10 (1984).

The act of manufacturing electricity in West Virginia involves the use by the manufacturer of numerous facilities and services provided by the State. For example, a power plant's employees' dependents are educated in the public schools; ingress and egress to the plant is provided by public roads; the plant is protected by West Virginia's state and local police; the company uses our courts; and, the company's employees are protected under West Virginia's workers' compensation and unemployment insurance. Certainly the *Complete Auto, supra,* requirement that state taxes be fairly related to the services provided is met in the case before us. State services are the same whether power produced here is consumed in West Virginia or elsewhere. As *Commonwealth Edison, supra,* indicates, the fact that a burdensome industry is established to service the export market does not relieve that industry of its fair share of properly apportioned state taxes.

Accordingly, for the reasons set forth above the judgment of the Circuit Court of Kanawha County is affirmed.

Affirmed.

APPENDIX

W. Va. Code 11-13-2d [1978] says in its entirety:

11-13-2d. Public service or utility business.

Upon any person engaging or continuing within this State in any public service or utility business, except railroad, railroad car, express, pipeline, telephone and telegraph companies, water carriers by steamboat or steamship and motor carriers, there is likewise hereby levied and shall be collected taxes on account of the business engaged in equal to gross income of the business multiplied by the respective rates as follows: Street and interurban and electric railways, one and four-tenths percent; water companies, four and four-tenths percent, except as to income received by municipally owned water plants; electric light and power companies, four percent on sales and demand charges for domestic purposes and commercial lighting and four percent on sales and demand charges for all other purposes, except as to income received by municipally owned plants producing or purchasing electricity and distributing same: Provided, that electric light and power companies which engage in the supplying of public service but which do not generate or produce electric power shall be taxed on the gross income derived therefrom at the rate of three percent on sales and demand charges for domestic purposes and commercial lighting and three percent on sales and demand charges for all other purposes, except as to income received by municipally owned plants: Provided, however, that the sale of electric power under this section shall be taxed at the rate of two and forty-six hundredths percent on that portion of the gross proceeds derived from the sale of electric power to a plant location of a customer engaged in a manufacturing activity, if the contract demand at such plant location exceeds two hundred thousand kilowatts per hour per year, or if the usage at such plant location exceeds two hundred thou-

sand kilowatts per hour in a year; natural gas companies, four and twenty-nine hundredths percent on the gross income; toll bridge companies, four and twenty-nine hundredths percent; and upon all other public service or utility business, two and eighty-six hundredths percent. The measure of this tax shall not include gross income derived from commerce between this State and other states of the United States or between this State and foreign countries. The measure of the tax under this section shall include only gross income received from the supplying of public services. The gross income of the taxpayer from any other activity shall be included in the measure of the tax imposed upon the appropriate section or sections of this article. (1935, c. 86; 1955, c. 165; 1959, c. 167; 1971, c. 169; 1978, c. 96.)

W. Va. Code 11-13-2m [1978] says in its entirety:

11-13-2m. Business of generating or producing electric power; exception; rates.

(1) Upon every person engaging or continuing within this State in the business of generating or producing electric power for sale, profit or commercial use, either directly or through the activity of others, in whole or in part, when the sale thereof is not subject to tax under section two-d [§ 11-13-2d] of this article, the amount of the tax to be equal to the value of the electric power, as shown by the gross proceeds derived from the sale thereof by the generator or producer of the same multiplied by a rate of four percent, except that the rate shall be two and forty-six hundredths percent on that portion of the gross proceeds derived from the sale of electric power to a plant location of a customer engaged in a manufacturing activity, if the contract demand at such plant location exceeds two hundred thousand kilowatts per hour per year, or if the usage at such plant location exceeds two hundred thousand kilowatts per hour in a year.

(2) The measure of this tax shall be the value of all electric power generated or produced in this State for sale, profit or commercial use, regardless of the place of sale or the fact that transmission may be to points outside this State: Provided, that the gross income received by municipally owned plants generating or producing electricity shall not be subject to tax under this article. (1978, c. 96.)

APPENDIX D

IN THE CIRCUIT COURT OF KANAWHA COUNTY
WEST VIRGINIA

Civil Action No. CA-78-1986

DUQUESNE LIGHT COMPANY,
OHIO POWER COMPANY,
WEST PENN POWER COMPANY,
APPALACHIAN POWER COMPANY,
MONONGAHELA POWER COMPANY,
THE POTOMAC EDISON COMPANY, and
VIRGINIA ELECTRIC AND POWER COMPANY,
Plaintiffs.

v.

STATE TAX DEPARTMENT OF WEST VIRGINIA and
MICHAEL E. CARYL, State Tax Commissioner
of West Virginia,
Defendants

OPINION AND FINAL ORDER

This case is now before the Court upon remand from the West Virginia Supreme Court of Appeals. The case was remanded so that the Court can rule upon plaintiffs' arguments that the tax imposed by W. Va. Code § 11-13-2 and § 11-13-2m is invalid under the Commerce Clause and the Equal Protection Clause of the United States Constitution, and the Equal and Uniform Taxation provision of the West Virginia Constitution.

FACTS

The facts of this case are set forth in a written stipulation of the parties, dated December 21, 1982. The

stipulation consists of two hundred and thirty-three typewritten pages, and forty-nine Stipulation Exhibits bound in two volumes. Volume No. 1 consists of Stipulation Exhibit Numbers 1 through 15, inclusive, and Volume No. 2 consists of Stipulation Exhibit Numbers 16 through 49.

OPINION

Upon the facts as set forth in the written stipulation made a part of the record by order entered December 21, 1982, the plaintiffs' Brief Upon Remand, the defendant's Brief Upon Remand and the plaintiffs' Reply Brief, the Court does hereby find as follows:

1. *West Virginia Code § 11-13-2 and § 11-13-2m do not discriminate against interstate commerce in violation of the Commerce Clause of the United States Constitution.*

The Business and Occupation Tax, as levied by § 2 on the privilege and at the rate prescribed by § 2m, is not exclusively an "export" tax. Taxpayers generating and selling electric power in West Virginia are exempt from tax under § 2m only on their public utility sales. The privilege of generating electricity is taxable if the West Virginia sale is not a public utility sale. Where domestic sales are subject to tax under § 2m, the tax clearly does not act as an "export" tax.

There is no discrimination against out-of-state taxpayers. The privilege being taxed, generation of electric power, is a West Virginia activity. The tax is levied only upon the value of electricity generated in West Virginia. Taxpayers who pay under § 2m, on domestic and/or exported electricity, are subject to tax at the same rate for exercising the same privilege. We are not confronted with the type of differential tax treatment which has been found discriminatory in other cases. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 618, 101 S. Ct. 2946, ——, 69 L.Ed. 2d 884, 894 (1981).

There is no discrimination where the tax is passed to out-of-state consumers through taxpayers' rate structures. There is no real discrimination. The tax burden is borne according to the amount of electricity generated in West Virginia, not according to any distinction between in-state and out-of-state taxpayers. *Commonwealth Edison Co.*, at 619, 101 S. Ct. at ——, 69 L.Ed2d at 895.

Plaintiffs also argue that the exclusions and exemptions from taxtion under § 2m violate the Commerce Clause. As discussed below, the exemptions and exclusions draw distinctions between taxpayers based upon factors which have nothing to do with whether or not electricity is exported. These exemptions and exclusions do not constitute discrimination under the Commerce Clause.

2. *The exemptions and exclusions provided by W. Va. Code § 11-13-2m do not violate the Equal Protection Clause of the United States Constitution or the Equal and Uniform Taxation Provision of the West Virginia Constitution.*

Plaintiffs argue that the exemption or exclusion of (1) electricity generated and sold in West Virginia by public utilities, (2) electricity generated by municipal power plants and (3) electricity generated and used in one's own manufacturing business, have the cumulative effect of turning the privilege taxed under § 2m into a tax on electricity generated for export. This argument fails to recognize that those who are exempted or excluded are different classes of taxpayers than those not exempted or excluded.

As noted above, the privilege taxed under § 2m is not one of exporting electricity. One who generates and sells electricity as a nonutility in West Virginia is taxable under § 2m. This is not an export tax.

The exemptions and exclusions apply to different classes of taxpayers, none of whom are in the same bus-

iness as Plaintiffs. Public utility businesses pay tax on their entire business, from generation through retail sales to the consumer. Plaintiffs pay tax only on their generation. The exemption for § 2d taxpayers under § 2m is based upon a valid distinction involving two classes of taxpayers.

Municipal electric power systems are governed by W. Va. Code § 8-19-1 *et seq.* They are exempt from taxation by the State, or its subdivisions. W. Va. Code § 8-19-4. Municipal electric power systems are a different class of taxpayer than plaintiffs. *South Carolina Power Co. v. South Carolina Tax Commission*, 52 F.2d 515 (E.D. S.C. 1931), aff'd., 286 U.S. 525, 76 L. Ed. 1268, 52 S. Ct. 494 (1932).

Taxpayers who generate there own electricity for use or consumption in their own manufacturing business are also a different class of taxpayer. *So. Carolina Power Co., supra.*

The exemptions and exclusions provided under W. Va. Code § 11-13-2m are all constitutional, because they distinguish between different classes of taxpayers.

ORDER

The Court does hereby ORDER and DECLARE that W. Va. § 11-13-2 and 11-13-2m, when read together and applied to plaintiffs, do not violate the Commerce Clause or the Equal Protection Clause of the United States Constitution, or the Equal and Uniform Taxation Provision of the West Virginia Constitution.

The Court does hereby FURTHER ORDER therefore, that Plaintiffs may not have injunctive relief upon these three remaining issues and upon these remaining issues, at least, the petition must be denied.

The Court does hereby FURTHER ORDER that a certified copy of this Final Order be sent to all parties or counsel of record. The Court notes the objection and

exception of the party or parties aggrieved by this Final Order.

Dated: December 6, 1985

ENTER:

/s/ Herman G. Canady, Jr.
HERMAN G. CANADY, JR.
Judge

APPENDIX E

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D.C. 20543

April 15, 1985

Mr. Robert E. Magnuson
Love, Wise & Woodroe
P.O. Box 951
Charleston, WV 25323

Re: Duquense Light Company, et al., v. State Tax Department of West Virginia and Herschel H. Rose, III, State Tax Commissioner of West Virginia
No. 84-1341

Dear Mr. Magnuson:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied. Justice Powell took no part in the consideration or decision of this petition.

Very truly yours,

/s/ Alexander L. Stevas
ALEXANDER L. STEVAS
Clerk

APPENDIX F

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 21st day of December, 1984, the following order was made and entered, to-wit:

16067

DUQUESNE LIGHT COMPANY,
OHIO POWER COMPANY,
WEST PENN POWER COMPANY,
APPALACHIAN POWER COMPANY,
MONONGAHELA POWER COMPANY,
THE POTOMAC EDISON COMPANY, and
VIRGINIA ELECTRIC AND POWER COMPANY,
Plaintiffs Below, Appellees

vs.

STATE TAX DEPARTMENT OF WEST VIRGINIA and
HERSCHEL H. ROSE, III, STATE TAX COMMISSIONER
OF WEST VIRGINIA,
Defendants Below, Appellants

The Court having maturely considered the petition for rehearing and reargument filed in the foregoing case on December 13, 1985, is of opinion to, and doth hereby deny the prayer of the petition and doth order that the final order entered herein be made absolute and certified as heretofore directed.

A True Copy

Attest: /s/ George W. Singleton
Clerk
Supreme Court
of Appeals

APPENDIX G

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 14th day of November, 1984, the following order was made and entered, to-wit:

16067

DUQUESNE LIGHT COMPANY,
OHIO POWER COMPANY,
WEST PENN POWER COMPANY,
APPALACHIAN POWER COMPANY,
MONONGAHELA POWER COMPANY,
THE POTOMAC EDISON COMPANY, and
VIRGINIA ELECTRIC AND POWER COMPANY,
Plaintiffs Below, Appellees

vs.

STATE TAX DEPARTMENT OF WEST VIRGINIA and
HERSCHEL H. ROSE, III, State Tax Commissioner
of West Virginia,
Defendants Below, Appellants

Upon an appeal from a judgment of the Circuit Court of Kanawha County rendered on the 4th day of August, 1983, and supplemented by corrective order entered September 13, 1983.

The Court having maturely considered the transcript of the record herein, and the argument and briefs of counsel thereon, is of opinion for reasons stated in writ-

ing and filed with the record that there is error in said judgment. It is therefore considered and ordered by the Court that the judgment of the Circuit Court of Kanawha County rendered on the 4th day of August, 1983, and supplemented by corrective order entered September 13, 1983, be, and the same is hereby, set aside, reversed and annulled, and that the appellants do recover of and from the appellees their costs about the prosecution of their appeal in this Court in this behalf expended. AND this action is remanded to the Circuit Court of Kanawha County for further proceedings to be had therein according to the principles stated in the written opinion aforesaid, and further according to law; all of which is ordered to be certified to the Circuit Court of Kanawha County.

The syllabus of points adjudicated, prefixed to the written opinion prepared by Justice Miller, was concurred in by Justice Harshbarger. Chief Justice McHugh and Justice McGraw concur and reserve the right to file concurring opinions. Justice Neely dissents and reserves the right to file a dissenting opinion.

A True Copy

Attest:

/s/ George W. Singleton
Clerk
Supreme Court
of Appeals

APPENDIX H

Chief Justice McHugh and Justice McGraw concur and reserve the right to file concurring opinions.

Justice Neely dissents and reserves the right to file a dissenting opinion.

THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 16067

DUQUESNE LIGHT CO., *et al.*

v.

STATE TAX DEPT., ETC., *et al.*

Kanawha County

Reversed and
Remanded

[Filed Nov. 14, 1984]

Miller, Justice

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1. Section 2m of the 1978 Acts of the Legislature, Chapter 96, does not violate the provisions of 15 U.S.C. § 391, as interpreted by the United States Supreme Court in the case of *Arizona Public Serv. Co. v. Snead*, 441 U.S. 141, 60 L.Ed. 2d 106, 99 S. Ct. 1629 (1979).

2. "This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance." Syllabus Point 2, *Sands v. Sec. Trust Co.*, 143 W. Va. 522, 102 S.E.2d 733 (1958).

Miller, Justice:

The State Tax Commissioner appeals a decision of the Circuit Court of Kanawha County which struck down our business and occupation tax on the generation of electric power, W. Va. Code, 11-13-2m.[1] The court below held that this case was controlled by *Arizona Public Serv. Co. v. Snead*, 441 U.S. 141, 60 L. Ed. 2d 106, 99 S. Ct. 1629 (1979), in which the United States Supreme Court struck down a New Mexico utility tax because it violated Section 2121(a) of the Tax Reform Act of 1976, 15 U.S.C. § 391 (1976). We disagree and reverse.

I.

Before addressing the particular facts and issues raised in this case, it is important to understand the *Snead* case. The United States Supreme Court in *Snead* decided the case based upon 15 U.S.C. § 391,[2] which had been enacted because of a discriminatory tax adopted by the State of New Mexico. The purpose of 15 U.S.C. § 391

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[1] The appellees are Duquesne Light Company, Ohio Power Company, West Penn Power Company, Appalachian Power Company, Monongahela Power Company, The Potomac Edison Company, and Virginia Electric and Power Company.

[2] 15 U.S.C. § 391 provides:

> "No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section, a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce."

was set out in the Senate Finance Committee Report, which the United States Supreme Court quoted:

> " 'The committee has learned that one State places a discriminatory tax upon the production of electricity within its boundaries for consumption outside its boundaries. While the rate of the tax itself is identical for electricity that is ultimately consumed outside the State and electricity which is consumed inside the State, discrimination results because the State allows the amount of the tax to be credited against its gross receipts tax if the electricity is consumed within its boundaries,' " 441 U.S. at 147, 60 L. Ed. 2d at 111, 99 S. Ct. at 1632-33.

As the United States Supreme Court noted, the name of the state was not disclosed in the Committee Report, but during the floor debate, "Senators Domenici and Montoya of New Mexico, Senators Fannin and Goldwater of Arizona and Senator Cranston of California made it clear that the provision was aimed directly at New Mexico's electrical energy tax." 441 U.S. at 147, 60 L. Ed. 2d at 112, 99 S. Ct. at 1633. Thus, the Supreme Court had before it a legislative enactment directed at a state statute that Congress had declared to be discriminatory.

A critical part of the Court's opinion was its determination that it would not adopt the Commerce Clause Test for determining whether the state tax was discriminatory under 15 U.S.C. § 391. New Mexico urged this test since it "requires examination of New Mexico's total tax structure to determine whether the State in fact imposes a greater tax burden on electricity sent out of state. See *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 69." 441 U.S. at 149, 60 L. Ed. 2d at 113, 99 S. Ct. at 1633-34. New Mexico's central argument was that if the Court would examine the state's entire utility tax, it would be clear that the tax on utilities

shipping energy out of state was not discriminatory.[3] However, the Court declined to look at the entire tax structure stating:

> "To look narrowly to the type of tax the federal statute names, rather than to consider the entire tax structure of the State, is to be faithful not only to the language of that statute but also to the expressed intent of Congress in enacting it. Because the electrical energy tax *itself* indirectly but necessarily discriminates against electricity sold outside New Mexico, it violates the federal statute." 441 U.S. at 149-50, 60 L. Ed. 2d at 113, 99 S. Ct. at 1634. (Emphasis in original; footnote omitted)

We observe that New Mexico's Electrical Energy Tax was enacted as a single tax enactment and not as part of a tax plan that affected related areas. Also of some importance is note 7 in *Snead*, 441 U.S. at 150, 60 L. Ed. 2d at 113, 99 S. Ct. at 1634, where the Court stated:

> "The *amici* in this case have pointed to several similar state taxes on the generation of electricity. Pa. Stat. Ann., Tit. 72, § 8101 (Purdon Supp. 1978-1979); Wash. Rev. Code §§ 82.16.020, 82.16.050 (1976); W. Va. Code §§ 11-13-2d, 11-13-2m (Supp. 1978). None of these States, however, has adopted precisely the scheme used by New Mexico, and we express no opinion as to the validity of these or any other state tax laws."

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[3] The United States Supreme Court summarized New Mexico's argument as follows:

> "Power sold within New Mexico, they argue, is subject to a 4% tax: 2% from the electrical energy tax and 2% from the gross receipts tax. By contrast, New Mexico subjects electricity sent out of state only to its 2% generation tax. The appellees contend, therefore, that if there is any discrimination in New Mexico's taxing structure, it is discrimination against electricity consumed within the State." 441 U.S. at 149, 60 L. Ed. 2d at 113, 99 S.Ct. at 1634.

With these salient points from *Snead* in mind, we proceed to discuss our tax.

II.

W. Va. Code, 11-13-2m, was enacted in 1978 as a part of a larger plan to reorganize the business and occupation tax on utilities.[4] Prior to 1978, electric utilities generating or selling electricity in this State were taxed under W. Va. Code, 11-13-2d, at the rate of 5.72 percent based on sales and demand charges for domestic purposes and 4.29 percent on sales and demand charges for all other purposes.[5] Electric utilities generating electricity in this State but transmitting it out of state were taxed under the general manufacturing tax rate under W. Va. Code, 11-13-2b, which was 0.88 percent. *See Virginia Elec. and Power Co. v. Haden*, 157 W. Va. 298, 200 S.E. 2d 848 (1973), *cert. denied*, 416 U.S. 916, 40 L. Ed. 2d 118, 94 S. Ct. 1624 (1974).

As applicable to this case, the material changes made by the 1978 amendments to W. Va. Code, 11-13-1, *et seq.*, were as follows: first, the taxation on manufacturing of electricity was removed from W. Va. Code, 11-13-2b, and placed in a new section, W. Va. Code, 11-13-2m. This section provides that the tax rate would be 4 percent, subject to a provision that the rate would be 2.46 percent on electricity sold to a customer engaged in manufacturing if the contract demand exceeded 200,000 kilowatts per hour per year, or if the usage exceeded 200,000 kilowatts per hour in a year.[6]

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[4] *See* 1978 W. Va. Acts, Ch. 96.

[5] W. Va. Code, 11-13-2d, excepted "income received by municipally owned plants producing or purchasing electricity and distributing same." This exception for municipally owned electric utilities was continued in the 1978 amendments. W. Va. Code, 11-13-2d (1978).

[6] W. Va. Code, 11-13-2m, provides:

"(1) Upon every person engaging or continuing within this State in the business of generating or producing electric power

The 1978 amendments also altered W. Va. Code, 11-13-2d, to provide that electric utilities generating electricity for sale in this State would be taxed at a 4 percent rate, and those which do not generate electricity but supply it are to be taxed at a 3 percent rate. A proviso similar to the one in Section 2m was placed in this section to provide for a reduced rate of 2.46 percent if a manufacturing customer's contract demand exceeded 200,000 kilowatts per hour per year or if the usage exceeded 200,000 kilowatts per hour per year.[7]

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for sale, profit or commercial use, either directly or through the activity of others, in whole or in part, when the sale thereof is not subject to tax under section two-d [§ 11-13-2d] of this article, the amount of the tax to be equal to the value of the electric power, as shown by the gross proceeds derived from the sale thereof by the generator or producer of the same multiplied by a rate of four percent, except that the rate shall be two and forty-six hundreths percent on that portion of the gross proceeds derived from the sale of electric power to a plant location of a customer engaged in a manufacturing activity, if the contract demand at such plant location exceeds two hundred thousand kilowatts per hour per year, or if the usage at such plant location exceeds two hundred thousand kilowatts per hour in a year.

"(2) The measure of this tax shall be the value of all electric power generated or produced in this State for sale, profit or commercial use, regardless of the place of sale or the fact that transmission may be to points outside this State: Provided, that the gross income received by municipally owned plants generating or producing electricity shall not be subject to tax under this article."

[7] The relevant portion of W. Va. Code, 11-13-2d, states:

"Upon any person engaging or continuing within this State in any public service or utility business . . . there is likewise hereby levied and shall be collected taxes on account of the business engaged in equal to gross income of the business multiplied by the respective rates as follows: . . . electric light and power companies, four percent on sales and demand charges for domestic purposes and commercial lighting and four percent on sales and demand charges for all other purposes . . .: Provided, that electric light and power companies

It is quite clear that the 1978 amendments harmonized the tax rate between the generation and sale in this State of electric power and the generation of electric power in this State for transmission out of state. It is true that there is some difference in language between Section 2d and 2m with regard to measuring the value of the product, i.e., electric power.[8] However, W. Va. Code, 11-13-2, was also amended in 1978 to bring equality to the measurement of the value between Sections 2d and 2m taxes:

> "If any person liable for any tax under sections two-a, two-l or two-m [§§ 11-13-2a, 11-13-21 or 11-13-2m] shall ship or transport his products or any part thereof out of the state without making sale of such products, the value of the products in the condition or form in which they exist immediately be-

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which engage in the supplying of public service but which do not generate or produce electric power shall be taxed on the gross income derived therefrom at the rate of three percent on sales and demand charges for domestic purposes and commercial lighting and three percent on sales and demand charges for all other purposes . . .: Provided, however, that the sale of electric power under this section shall be taxed at the rate of two and forty-six hundreths percent on that portion of the gross proceeds derived from the sale of electric power to a plant location of a customer engaged in a manufacturing activity, if the contract demand at such plant location exceeds two hundred thousands kilowatts per hour per year, or if the usage at such plant location exceeds two hundred thousands kilowatts per hour in a year . . . . The measure of this tax shall not include gross income derived from commerce between this State and other states of the United States or between this State and foreign countries. The measure of the tax under this section shall include only gross income received from the supplying of public services. The gross income of the taxpayer from any other activity shall be included in the measure of the tax imposed upon the appropriate section or sections of this article."

[8] W. Va. Code, 11-13-2d, uses the term "gross income" from "sales and demand charges"; and W. Va. Code, 11-13-2m, uses the term "gross proceeds derived from the sale thereof."

fore transportation out of the state shall be the basis for the assessment to the tax imposed in said section, except in those instances in which another measure of the tax is expressly provided. The tax commissioner shall prescribe equitable and uniform rules for ascertaining such value." [9]

III.

With this background in mind, we address the issue in this case: does W. Va. Code, 11-13-2m, violate 15 U.S.C. § 391? The circuit court did not elaborate on its holding. The principal argument advanced by the utilities is that Section 2m must be read in isolation. When it is, it is patently discriminatory under *Snead* because it taxes only the manufacturing of electricity which is transmitted out of state, and excludes in-state manufacturing by its reference to Section 2d.

We are cited several cases in which we have held that our business and occupation tax is composed of a number of separate taxes which are applicable to various distinct business activities. *E.g., Virginia Elec. and Power Co. v. Haden, supra*; *United Fuel Gas Co. v. Battle*, 153 W. Va. 222, 167 S.E.2d 890, *appeal dismissed sub nom. United Fuel Gas Co. v. Haden*, 396 U.S. 116, 24 L. Ed. 2d 309, 90 S. Ct. 398 (1969); *Owens-Illinois Glass Co. v. Battle*,

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[9] The parties agree that the State Tax Commissioner has by a written memorandum with the appellees adopted a uniform formula for ascertaining the value of electricity under Section 2m, which is known as the VEPCO formula. Under this formula, value is essentially the cost of generation at the place of manufacture plus an allowed rate of return. (Appellees' brief, p. 6-7) The Tax Commissioner argues, and we agree, that with the tax rates being the same, this valuation or measurement yields a lower tax on electric power transmitted out of state, because the measurement of value for electricity generated and sold in this State includes not only the cost of manufacturing and a reasonable rate of return, but the cost of transporting it to the customer (poles, lines, transformers, etc.) as well.

151 W. Va. 655, 154 S.E.2d 854 (1967). Based upon these cases, the argument is made that each section of the business and occupation tax must stand scrutiny separately.

We have not, however, adopted such a rigid view of our business and occupation tax structure. For example, in *Owens-Illinois Glass Co. v. Battle*, we utilized the doctrine of *in pari materia* to settle a question under our business and occupation tax by construing several related provisions.

Moreover, we cannot ignore the fact that the 1978 amendments did more than enact Section 2m. As we have previously stated, several sections of the business and occupation tax which dealt with the manufacturing of electricity were amended. Under well known canons of statutory construction, we are obliged to consider a legislative enactment in its entirety. *Woodring v. Whyte*, —— W. Va. ——, 242 S.E.2d 238 (1978); *Spencer v. Yearce*, 155 W. Va. 54, 180 S.E.2d 868 (1971); Syllabus Point 1, *State ex rel. Holbert v. Robinson*, 134 W. Va. 524, 59 S.E.2d 884 (1950).

If we consider the 1978 amendments in their entirety, it is apparent that the legislature did not single out and tax only the manufacturing of electricity that is transmitted out of state. Under Section 2d, the manufacturing of electricity that is used in this State is also taxed at the same rate.

Our situation is entirely different from what existed in *Snead* where New Mexico had enacted a single tax statute directed at manufacturing electricity which was transmitted out of state. As noted in our analysis of the *Snead* decision, the Court refused to go beyond the confines of the statute to determine from the total framework of New Mexico's tax scheme if the particular tax was in fact discriminatory.

In the present case, the 1978 amendments embody both Sections 2d and 2m. It is clear that both sections tax the business of generating electric power at the same rates. It is also clear that Section 2d deals with in-state generation and sale while Section 2m relates only to in-state generation or manufacture which is transmitted out of state. We find no discrimination between Sections 2d and 2m.

The fundamental fallacy of the appellees' argument is that they would have us limit our analysis to Section 2m, as if the legislative amendments in 1978 involved only this section.[10] We cannot, however, ignore the other sections contained in the 1978 amendments dealing with the manufacture of electrical power.[11]

Consequently, we hold that Section 2m of the 1978 Acts of the Legislature, Chapter 96, does not violate the provisions of 15 U.S.C. § 391, as interpreted by the United States Supreme Court in the case of *Arizona Public Serv. Co. v. Snead*, 441 U.S. 141, 60 L. Ed. 2d 106, 99 S. Ct. 1629 (1979), and the Circuit Court of Kanawha County erred in holding that it did.

IV.

Although both parties have briefed the question of whether the statute violates the Commerce and Equal Protection Clauses of the United States Constitution, as well as the Equal and Uniform Taxation Provision of the West Virginia Constitution, we decline to address these issues because they were not passed upon by the circuit court. We have traditionally held, as indicated in Sylla-

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[10] This was also the mistake in the student analysis on which the trial court relied in part. *See* Note, *West Virginia's Generation of Electricity Tax: Is It Valid After Snead?*, 83 W. Va. L. Rev. 79 (1981).

[11] *See, i.e.*, W. Va. Code, 11-13-2, -2b, -2d and -2m.

bus Point 2 of *Sands v. Sec. Trust Co.*, 143 W. Va. 522, 102 S.E.2d 733 (1958), that:

> "This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance."

See also West Virginia Dept. of Highways v. Delta Concrete Co., —— W. Va. ——, 268 S.E.2d 124 (1980); *Dixon v. American Indus. Leasing Co.*, 157 W. Va. 735, 205 S.E.2d 4 (1974); Syllabus Point 1, *Pettry v. Chesapeake and Ohio Ry. Co.*, 148 W. Va. 443, 135 S.E.2d 729 (1964).

Because we have found the circuit court in error in its application of *Snead*, we reverse the judgment and remand the case in order that it may consider the other grounds asserted by the appellees in their complaint.

Reversed and Remanded.

[Filed Dec. 3, 1984]

Neely, Justice, concurring: [1]

I concur to mention some additional distinctions between our business and occupation tax structure and the electrical energy tax that was held invalid in *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979). Under the taxing scheme enacted by the State of New Mexico, a producer of electricity in New Mexico who sold the electricity out-of-state paid a 2 percent tax that would not have been collected if the electricity had been sold in New Mexico. In effect, then, New Mexico taxed separately the production of electric power for export.

Under New Mexico law distributors of electrical energy were liable to payment of a gross receipts tax of 4 percent.[2] This tax, enacted in 1953, was not related to electricity generation; the utility would have paid the same 4 percent if it had been a door-to-door distributor of bubble gum.[3]

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[1] Originally I noted a possible dissent in this case because it appeared that the West Virginia situation was controlled by *Arizona Public Service v. Snead, infra.* But as I methodically worked through the New Mexico and West Virginia tax schemes, my dissent became a concurrence. I now agree with the majority's opinion and add this concurrence only to explain my own reasoning in the hope that I might save work for others.

[2] NMSA 7-9-1 to 7-9-81 [1978] sets out New Mexico's general excise tax.

[3] The tax imposed on the New Mexico electric utilities was a general excise tax that applied in equal measure to all other businesses within the State. That section, NMSA 7-9-4 [1983], in its present incarnation reads: "A. For the privilege of engaging in business, an excise tax equal to three and three-fourths percent of gross receipts is imposed on any person engaging in business in New Mexico. B. The tax imposed by this section shall be referred to as the 'gross receipts tax.' "

When the New Mexico electrical energy tax[4] was imposed, the statute gave credit for the electrical energy tax against the New Mexico gross receipts tax—a credit that could be used only by in-state, New Mexico producers/distributors. Thus, although New Mexico was entitled to tax the production of electrical energy, it failed to tax both the domestic and foreign producers equally because New Mexico, in effect, refunded the tax to domestic producers through a tax credit that applied to an entirely unrelated tax. That is the difference between *pre-Snead* New Mexico and today's West Virginia. What if New Mexico had given compensating credits against domestic producers' turnpike tolls or had given them a credit toward the New Mexico vehicle licenses of power company trucks? These examples make clear that the electrical energy tax and its compensating credit for in-state producers explicitly discriminated against interstate commerce.

West Virginia does not refund the electricity generation tax to domestic producers; West Virginia taxes domestic producers more heavily because they *do* more in West Virginia. But at first blush West Virginia's scheme appears similar to New Mexico's scheme because we have one subsection of the *West Virginia Code* that applies to foreign producers and another that applies to domestic producers. Our tax for both domestic and foreign producers, however, is calculated on exactly the same basis, namely on the value of electricity manufactured, transmitted, and distributed.

The structure of *W. Va. Code*, 11-13-2d [1978] and 11-13-2m [1978] discloses that West Virginia taxes all the electrical utilities equally along a continuum that

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[4] NMSA 7-18-1 to 7-18-76 [1978]. New Mexico's electrical energy tax, repealed in 1982, related to the imposition and rate of tax on the generation of electricity and required reports or remittances of persons subject to the tax.

starts with manufacture of the power and ends with its delivery to the consumer. New Mexico's tax was levied *only* upon electricity *manufactured*; the credit, however, was against gross domestic *sales*. In evaluating the applicability of *Snead, supra*, to the West Virginia business and occupation tax it is important to point out that the New Mexico tax gave credit for one type of tax—an electrical energy tax—against another type of tax, namely a sales tax.

In state statutes that affect interstate commerce, words or art or characterizations can be more significant than in almost any other area of law. Phrases such as "privilege of doing business" or "general excise" can make or break a state statute. The Supreme Court has held that such "magic words or labels" cannot validate an otherwise invalid tax, but may be capable of disabling "an otherwise constitutional levy." *Railway Express Agency v. Virginia*, 358 U.S. 434, at 441 (1959).

Under the Supreme Court's recent view of state taxation of interstate commerce, a state tax on the "privilege of doing business" is not *per se* unconstitutional in the absence of a claim "that the activity is not sufficiently connected to the State to justify a tax, or that the tax is not fairly related to benefits provided the taxpayers, or that the tax discriminates against interstate commerce, or that the tax is not fairly apportioned." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, at 287 (1977), *reh. den.* 430 U.S. 976 (1977). Accordingly, West Virginia's business and occupation tax passes constitutional muster. The entire process of providing electricity to the ultimate consumer is taxed. If the whole process goes on in West Virginia, then West Virginia taxes manufacture, transmission, and distribution. But if only manufacture occurs in West Virginia, West Virginia taxes only manufacture. Thus the tax is fairly apportioned and violates neither the *Constitution of the United States*, or 15 U.S.C. § 391 (1976).

In order to understand the legality, under *Snead, supra*, of West Virginia's business and occupation tax structure as applied to out-of-state utilities one must look for a moment at the nature of the electric utility business. Approximately 90.8 percent of the value of electrical energy at the point of consumption is attributable to the *cost of manufacture.* For example, if we study the 1983 Annual Report of the Appalachian Power Company we find that its production of power (manufacture) expenses were $495,741,691 while its bulk transmission costs were only $15,981,809 and its cost of low voltage distribution to consumers was only $41,147,842. Consequently, the biggest overall activity in the electric utility business is manufacture.

The only reason that West Virginia taxes generation of power for out-of-state consumption under *W. Va. Code,* 11-13-2m [1978] and generation for in-state consumption under *W. Va. Code,* 11-13-2d [1978] is so that out-of-state producers will *not* pay tax on the value of transmission and distribution activities. The tax for in-state consumption is higher than the tax on out-of-state consumption because West Virginia also taxes transmission and distribution for in-state producers. Under the West Virginia business and occupation tax statutes everything that an electric utility does in the State of West Virginia—whether a foreign or domestic producer—is taxed at 4 percent. Manufacturers of electrical energy for sale inside West Virginia are treated exactly as manufacturers of electrical energy for sale outside of West Virginia.

For our purposes here it is important to point out that West Virginia makes no effort to exempt in-state producers and distributors from the burden of the tax on electrical energy production. This lack of discrimination is made possible because West Virginia has always had a business and occupation tax on the public utility business. New Mexico ran afoul of 15 U.S.C. § 391 (1976)

because, for all intents and purposes, New Mexico taxed out-of-state producers on the basis of generation and in-state producers on the basis of gross receipts (sales). Since New Mexico relied upon a gross receipts (sales) tax to raise revenue from producers of electricity *in New Mexico* it had no choice but to enact a subsequent special electrical energy tax to capture revenue from utilities generating power in New Mexico to be *sold outside* of New Mexico. Without New Mexico's 2 percent tax credit against the gross receipts tax, New Mexico consumers would have had their rates increased by 2 percent.

What New Mexico did was entirely logical, but also probably unconstitutional; at least we know that it was against the subsequently enacted 15 U.S.C. § 391 (1976). In New Mexico's case the substance of the tax was reasonable but the form was unconstitutional. The Supreme Court's overruling of *Specter Motor Service v. O'Connor*, 340 U.S. 602 (1951) in *Complete Auto Transit Inc. v. Brady, supra*, implies that triumphs of form over substance are no longer fashionable in determining whether a tax is a burden on interstate commerce. At some point, however, form becomes substance: it is a fine line, but it was crossed by New Mexico. Under *Complete Auto, supra*, West Virginia is on the constitutional side of the line as well as being within 15 U.S.C. § 391 (1976).

It may appear initially that the distinction between New Mexico's 2 percent credit for the electrical energy tax against the New Mexico gross receipts tax *versus* West Virginia's exemption from the operation of *W. Va. Code*, 11-13-2m [1978] for local utilities paying tax under *W. Va. Code*, 11-13-2d [1978] is a distinction without a difference. But nothing could be father from the truth: there is a difference and that difference relates to the fact that West Virginia producers and distributors of electricity are not exempt from the burden of *W. Va. Code*, 11-13-2m [1978] but, rather, are subjected to exactly the same burden plus the *additional* tax on trans-

mission and distribution provided in *W. Va. Code*, 11-13-2d [1978]. If, indeed, we had imposed a special tax on the generation of electric power and then given West Virginia producers/distributors of power a credit against an entirely unrelated sales tax we would be within the purview of *Arizona Public Service Co. v. Snead, supra.* But we didn't!

APPENDIX I

IN THE CIRCUIT COURT OF KANAWHA COUNTY
WEST VIRGINIA

Civil Action No. CA-78-1986

DUQUESNE LIGHT COMPANY,
OHIO POWER COMPANY,
WEST PENN POWER COMPANY,
APPALACHIAN POWER COMPANY,
MONONGAHELA POWER COMPANY,
THE POTOMAC EDISON COMPANY, and
VIRGINIA ELECTRIC AND POWER COMPANY,
Plaintiffs,

v.

STATE TAX DEPARTMENT OF WEST VIRGINIA and
HERSCHEL H. ROSE, III, STATE TAX COMMISSIONER
OF WEST VIRGINIA,
Defendants.

CORRECTIVE ORDER

This day came the Defendants, by William F. Carroll, Deputy Attorney General, their counsel, and came also the Plaintiffs, by Robert E. Magnuson and William W. Booker, their counsel, for hearing upon the Defendants' "Motion for Findings of Facts" and the Court, having considered said motion and the memoranda of law and oral argument of counsel thereon, is of the opinion that, pursuant to Rule 60(b) R.C.P., the final judgment order of the Court, dated August 4, 1983 entered in this action, should be corrected, and it is, therefore, ORDERED that said final judgment order of August 4, 1983, is hereby amended to read as follows:

FINAL ORDER

Upon the facts set forth in the written stipulation of the parties, dated December 21, 1982, consisting of two hundred and thirty-three typewritten pages, together with forty-nine (49) Stipulation Exhibits bound in two (2) volumes, labeled Volume No. I and Volume No. II, respectively, Volume No. I containing Stipulation Exhibit Numbers 1 through 15, inclusive, and Volume No. II containing Stipulation Exhibit Numbers 16 through 49, inclusive, which said Stipulation and Stipulation Exhibits were filed and made part of the record in this action by order entered on December 21, 1982, the Plaintiffs' Brief, the Defendant's Brief and the Plaintiffs' Reply to the Defendants' Brief, which said briefs are incorporated herein by reference, the Court does hereby DECLARE and ORDER that West Virginia Code, 11-13-2m (1978) is invalid and unenforceable because it violates 15 U.S.C. § 391 (1976). *See Arizona Public Service Co. v. Snead*, 441 U.S. 141, 60 L. Ed. 2d 106, 99 S. Ct. 1629 (1979); Note, *West Virginia Generation of Electricity Tax: Is It Valid After Snead*, 83 W. Va. L. Rev. 79 (1981). The Court consequently concludes that it is not necessary to, and does not, address the other grounds raised by the Plaintiffs upon which the tax in question is allegedly invalid.

The Court does, accordingly, hereby further ORDER that the Defendants are enjoined and restrained from assessing and collecting or otherwise enforcing the tax in question.

The Court does hereby further ORDER that a certified copy of this FINAL ORDER be sent to counsel of record for the parties.

The Court notes the objection of the Defendants to this FINAL ORDER.

Entered this 13th day of September, 1983.

/s/ Herman G. Canady, Jr.
HERMAN G. CANADY, JR.
Judge
13th Judicial Circuit of
West Virginia

IN THE CIRCUIT COURT OF KANAWHA COUNTY
WEST VIRGINIA

Civil Action No. CA-78-1986

DUQUESNE LIGHT COMPANY,
OHIO POWER COMPANY,
WEST PENN POWER COMPANY,
APPALACHIAN POWER COMPANY,
MONONGAHELA POWER COMPANY,
THE POTOMAC EDISON COMPANY, and
VIRGINIA ELECTRIC AND POWER COMPANY,
Plaintiffs,

v.

STATE TAX DEPARTMENT OF WEST VIRGINIA and
HERSCHEL H. ROSE, III, AS SUCCESSOR TO
DAVID C. HARDESTY, JR., STATE TAX COMMISSIONER
OF WEST VIRGINIA,
Defendants.

FINAL ORDER

Upon the facts and for the reasons set forth in Plaintiff's Brief and Plaintiff's Reply to Defendant's Brief, which briefs are incorporated herein by reference, the Court does hereby DECLARE and ORDER that West Virginia Code, 11-13-2m (1978) is invalid and unenforceable because it violates 15 U.S.C. § 391 (1976). *See Arizona Public Service Co. v. Snead*, 441 U.S. 141, 60 L. Ed. 2d 106, 99 S. Ct. 1629 (1979); Note, *West Virginia Generation of Electricity Tax: Is It Valid After Snead*, 83 W. Va. L. Rev. 79 (1981). The Court consequently concludes that it is not necessary to, and does not, address the other grounds raised by the Plaintiffs upon which the tax in question is allegedly invalid.

The Court does, accordingly, hereby further ORDER that the Defendants are enjoined and restrained from assessing and collecting or otherwise enforcing the tax in question.

The Court does hereby further ORDER that a certified copy of this FINAL ORDER be sent to counsel of record for the parties.

The Court notes the objection of the Defendants to this FINAL ORDER.

Entered this 4th day of August, 1983.

/s/ Herman G. Canady, Jr.
HERMAN G. CANADY, JR.,
Judge
13th Judicial Circuit of
West Virginia

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, S.S.

I, Phyllis Jean Cole, Clerk of the Circuit Court of said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court. Given under my hand and signed by the Court this 8th day of Aug.

/s/ Phyllis Jean Cole
Clerk
Circuit Court
Kanawha County
West Virginia

APPENDIX J

IN THE CIRCUIT COURT OF KANAWHA COUNTY
WEST VIRGINIA

Civil Action No. CA-78-1986

DUQUESNE LIGHT COMPANY,
OHIO POWER COMPANY,
WEST PENN POWER COMPANY,
APPALACHIAN POWER COMPANY,
MONONGAHELA POWER COMPANY,
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STATE TAX DEPARTMENT OF WEST VIRGINIA and
HERSCHEL H. ROSE, III, AS SUCCESSOR TO
DAVID C. HARDESTY, JR., STATE TAX COMMISSIONER
OF WEST VIRGINIA,
Defendants.

FINAL ORDER

Upon the facts and for the reasons set forth in Plaintiff's Brief and Plaintiff's Reply to Defendant's Brief, which briefs are incorporated herein by reference, the Court does hereby DECLARE and ORDER that West Virginia Code, 11-13-2m (1978) is invalid and unenforceable because it violates 15 U.S.C. § 391 (1976). *See Arizona Public Service Co. v. Snead*, 441 U.S. 141, 60 L. ED. 2d 106, 99 S. Ct. 1629 (1979); Note, *West Virginia Generation of Electricity Tax: Is It Valid After Snead*, 83 W. Va. L. Rev. 79 (1981). The Court consequently concludes that it is not necessary to, and does

not, address the other grounds raised by the Plaintiffs upon which the tax in question is allegedly invalid.

The Court does, accordingly, hereby further ORDER that the Defendants are enjoined and restrained from assessing and collecting or otherwise enforcing the tax in question.

The Court does hereby further ORDER that a certified copy of this FINAL ORDER be sent to counsel of record for the parties.

The Court notes the objection of the Defendants to this FINAL ORDER.

Entered this 4th day of August 1983.

/s/ Herman G. Canady, Jr.
HERMAN G. CANADY, JR.,
Judge
13th Judicial Circuit of
West Virginia

APPENDIX K

CONSTITUTION AND STATUTES

A. *United States Constitution and Code*:

1. Article I, Section 8, Clause 3 (the Commerce Clause)

The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes;

2. Article VI, Clause 2 (the Supremacy Clause)

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3. Amendment XIV, Section 1, Clause 4

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. Section 2121(a), Tax Reform Act of 1976 (15 U.S.C. § 391) Tax on or with respect to generation or transmission of electricity

No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, re-

tailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

B. *West Virginia Code*:

1. § 11-13-2b. Manufacturing, compounding or preparing products; processing of food; exception of generated or produced electric power by public utilities or others; treatment accorded electricity generated by manufacturers for own use; valuation of timber products.

Upon every person engaging or continuing within this State in the business of manufacturing, compounding or preparing for sale, profit, or commercial use, either directly or through the activity of others in whole or in part, any article or articles, substance or substances, commodity or commodities, or newspaper publishing (including all gross income or proceeds of sale from circulation and advertising), except electric power produced by public utilities or others, the amount of the tax to be equal to the value of the article, substance, commodity or newspaper, manufactured, compounded or prepared for sale, as shown by the gross proceeds derived from the sale thereof by the manufacturer or person compounding or preparing the same, except as otherwise provided, multiplied by a rate of eighty-eight one-hundredths of one percent. The measure of this tax is the value of the entire product manufactured, compounded or prepared in the State for sale, profit or commercial use, regardless of the place of sale or the fact that deliveries may be made to points outside the State. The value of electricity generated by persons taxed under the provisions of this section, which electricity is directly used by such persons in

the business of manufacturing and not sold or otherwise transferred or transmitted to others, shall be exempt from the imposition of any tax under this article. With respect to the manufacturing, compounding or preparing for sale of timber or timber products, the measure of this tax is the value of the entire timber product manufactured, compounded or prepared in the State for sale, profit or commercial use, regardless of the place of sale or the fact that deliveries may be made to points outside the State but such values shall not include the value of any timber or timber products used as ingredients, components, or elements of such timber products. The dressing and processing of food by a person, firm or corporation, which food is to be sold on a wholesale basis by such person, firm or corporation shall not be considered as manufacturing or compounding, but the sale of those products on a wholesale basis shall be subject to the same tax as is imposed on the business of selling at wholesale as provided in section two-c [§ 11-13-2c].

It is further provided, however, that in those instances in which the same person partially manufactures; compounds or prepares products within this State and partially manufactures, compounds or prepares such products outside of this State the measure of this tax under this section shall be that proportion of the sale price of the product that the payroll cost of manufacturing the product; or, at the option of the taxpayer, the measure of this tax under this section shall be the proportion of the sales value of the articles that the cost of operations in West Virginia bears to the full cost of manufacture of the articles. (1935, c. 86; 1951, c. 179; 1955, c. 165; 1959, c. 167; 1967, c. 188; 1971, c. 1969; 1974, c. 133; 1978, c. 96, 1982, c. 124; 1982, 1st Ex. Sess., c.5.)

2. § 11-13-2d. Public service or utility business.

Upon any person engaging or continuing within this State in any public service or utility business, except

railroad, railroad car, express, pipeline, telephone and telegraph companies, water carriers by steamboat or steamship and motor carriers, there is likewise hereby levied and shall be collected taxes on account of the business engaged in equal to gross income of the business multiplied by the respective rates as follows: Street and interurban and electric railways, one and four-tenths percent; water companies, four and four-tenths percent, except as to income received by municipally owned water plants; electric light and power companies, four percent on sales and demand charges for domestic purposes and commercial lighting and four percent on sales and demand charges for all other purposes, except as to income received by municipally owned plants producing or purchasing electricity and distributing same: Provided, that electric light and power companies which engage in the supplying of public service but which do not generate or produce electric power shall be taxed on the gross income derived therefrom at the rate of three percent on sales and demand charges for domestic purposes and commercial lighting and three percent on sales and demand charges for all other purposes, except as to income received by municipally owned plants: Provided, however, that the sale of electric power under this section shall be taxed at the rate of two and forty-six hundredths percent on that portion of the gross proceeds derived from the sale of electric power to a plant location of a customer engaged in a manufacturing activity, if the contract demand at such plant location exceeds two hundred thousand kilowatts per hour per year, or if the usage at such plant location exceeds two hundred thousand kilowatts per hour in a year; natural gas companies, four and twenty-nine hundredths percent on the gross income; toll bridge companies, four and twenty-nine hundredths percent; and upon all other public service or utility business, two and eighty-six hundredths percent. The measure of this tax shall not include gross income

derived from commerce between this State and other states of the United States or between this State and foreign countries. The measure of the tax under this section shall include only gross income received from the supplying of public services. The gross income of the taxpayer from any other activity shall be included in the measure of the tax imposed upon the appropriation section or sections of this article. (1935, c. 86; 1955, c. 165; 1959, c. 167; 1971, c. 169; 1978, c. 96.)

3. § 11-13-2m. Business of generating or producing electric power; exception; rates.

(1) Upon every person engaging or continuing within this State in the business of generating or producing electric power for sale, profit or commercial use, either directly or through the activity of others, in whole or in part, when the sale thereof is not subject to tax under section two-d [§ 11-13-2d] of this article, the amount of the tax to be equal to the value of the electric power, as shown by the gross proceeds derived from the sale thereof by the generator or producer of the same multiplied by a rate of four percent, except that the rate shall be two and forty-six hundredths percent on that portion of the gross proceeds derived from the sale of electric power to a plant location of a customer engaged in a manufacturing activity, if the contract demand at such plant location exceeds two hundred thousand kilowatts per hour per year, or if the usage at such plant location exceeds two hundred thousand kilowatts per hour in a year.

(2) The measure of this tax shall be the value of all electric power generated or produced in this State for sale, profit or commercial use, regardless of the place of sale or the fact that transmission may be to points outside this State: Provided, that the gross income received by municipally owned plants generating or producing electricity shall not be subject to tax under this article. (1978, c. 96.)

APPENDIX L

ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 163

(By Mr. Oates)

[Passed March 11, 1978, in effect April 1, 1978.]

AN ACT to amend and reenact sections two, two-b, two-d two-k, three-b and twenty-five, article thirteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to further amend said article thirteen by adding thereto a new section, designated section two-m; and to amend and reenact section two, article thirteen-c of said chapter eleven, all relating to business and occupation taxes; imposition of privilege taxes on privileges of generating or producing electric power and on supplying of public service by electric light and power companies; establishing rates and measures of such taxes; establishing rate of tax on electric light and power companies which supply public service but which do not produce electric power; establishing rate of tax on electric power used in certain quantities at plant locations of manufacturers; clarifying tax treatment of electricity generated by manufacturers for own use; relating to tax credit for industrial expansion; and expanding definition of "in-

dustrial taxpayer" to include persons exercising privilege of generating or producing electric power.

Be it enacted by the Legislature of West Virginia:

That sections two, two-b, two-d, two-k, three-b and twenty-five, article thirteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; that said article thirteen be further amended by adding thereto a new section, designated section two-m; and that section two, article thirteen-c of said chapter eleven be amended and reenacted, all to read as follows:

ARTICLE 13. BUSINESS AND OCCUPATION TAX.

§ 11-13-2. Imposition of privilege tax.

There is hereby levied and shall be collected annual privilege taxes against the persons, on account of the business and other activities, and in the amounts to be determined by the application of rates against values or gross income as set forth in sections two-a to two-m, inclusive, of this article.

If any person liable for any tax under sections two-a, two-b, two-l or two-m shall ship or transport his products or any part thereof out of the state without making sale of such products, the value of the products in the condition or form in which they exist immediately before transportation out of the state shall be the basis for the assessment of the tax imposed in said section, except in those instances in which another measure of the tax is expressly provided. The tax commissioner shall prescribe equitable and uniform rules for ascertaining such value.

In determining value, however, as regards sales from one to another of affiliated companies or persons, or under other circumstances where the relation between the buyer and seller is such that the gross proceeds from the sale are not indicative of the true value of the subject

matter of the sale, the tax commissioner shall prescribe uniform and equitable rules for determining the value upon which such privilege tax shall be levied, corresponding as nearly as possible to the gross proceeds from the sale of similar products of like quality or character where no common interest exists between the buyer and seller but the circumstances and conditions are otherwise similar.

Gross income included in the measure of the tax under sections two-a, two-b, two-l and two-m of this article shall neither be added nor deducted in computing the tax levied under the other sections of this article.

A person exercising any privilege taxable under sections two-a, two-b, two-l or two-m of this article and engaging in the business of selling his natural resources, manufactured products, or electricity at retail in this state shall be required to make returns of the gross proceeds of such retail sales and pay the tax imposed in section two-c of this article for the privilege of engaging in the business of selling such natural resources, manufactured products or electricity at retail in this state. But any person exercising any privilege taxable under sections two-a, two-b, two-l or two-m of this article and engaging in the business of selling his natural resources, manufactured products, or electricity to producers of natural resources, manufacturers, wholesalers, jobbers, retailers or commercial consumers for use or consumption in the purchaser's business shall not be required to pay the tax imposed in section two-c of this article.

Persons exercising any privilege taxable under section two-b or two-m of this article shall not be required to pay the tax imposed in section two-c of this article for the privilege of selling their manufactured products or electricity for delivery outside of this state, but the gross income derived from the sale of such products or electricity outside of this state shall be included in determining the measure of the tax imposed on such person in section two-b or two-m.

A person exercising privileges taxable under the other sections of this article, producing coal, oil, natural gas, minerals, timber or other natural resource products the production of which is taxable under sections two-a and two-l, and using or consuming the same in his business or transferring or delivering the same as any royalty payment, in kind, or the like, shall be deemed to be engaged in the business of mining and producing coal, oil, natural gas, minerals, timber or other natural resource products for sale, profit or commercial use, and shall be required to make returns on account of the production of the business showing the gross proceeds or equivalent in accordance with uniform and equitable rules for determining the value upon which such privilege tax shall be levied, corresponding as nearly as possible to the gross proceeds from the sale of similar products of like quality or character by other taxpayers, which rules the tax commissioner shall prescribe.

§ 11-13-2b. Manufacturing, compounding or preparing products; processing of food; exception of generated or produced electric power by public utilities or others; treatment accorded electricity generated by manufacturers for own use.

Upon every person engaging or continuing within this state in the business of manufacturing, compounding or preparing for sale, profit, or commercial use, either directly or through the activity of others in whole or part, any article or articles, substance or substances, commodity or commodities, or newspaper publishing (including all gross income or proceeds of sale from circulation and advertising), except electric power produced by public utilities or others, the amount of the tax to be equal to the value of the article, substance, commodity or newspaper, manufactured, compounded or prepared for sale, as shown by the gross proceeds derived from the sale

thereof by the manufacturer or persons compounding or preparing the same, except as otherwise provided, multiplied by a rate of eighty-eight one-hundredths of one percent. The measure of this tax is the value of the entire product manufactured, compounded or prepared in this state for sale, profit or commercial use, regardless of the place of sale or the fact that deliveries may be made to points outside the state. The value of electricity generated by persons taxed under the provisions of this section, which electricity is directly used by such persons in the business of manufacturing and not sold or otherwise transferred or transmitted to others, shall be exempt from the imposition of any tax under this article. The dressing and processing of food by a person, firm or corporation, which food is to be sold on a wholesale basis by such person, firm or corporation shall not be considered as manufacturing or compounding, but the sale of these products on a wholesale basis shall be subject to the same tax as is imposed on the business of selling at wholesale as provided in section two-c.

It is further provided, however, that in those instances in which the same person partially manufactures, compounds or prepares products within this state and partially manufactures, compounds or prepares such products outside of this state the measure of his tax under this section shall be that proportion of the sale price of the product that the payroll cost of manufacturing within this state bears to the entire payroll cost of manufacturing the product; or, at the option of the taxpayer, the measure of his tax under this section shall be the proportion of the sales value of the articles that the cost of operations in West Virginia bears to the full cost of manufacture of the articles.

§ 11-13-2d. Public service or utility business.

Upon any person engaging or continuing within this state in any public service or utility business, except rail-

road, railroad car, express, pipeline, telephone and telegraph companies, water carriers by steamboat or steamship and motor carriers, there is likewise hereby levied and shall be collected taxes on account of the business engaged in equal to gross income of the business multiplied by the respective rates as follows: Street and interurban and electric railways, one and four-tenths percent; water companies, four and four-tenths percent except as to income received by municipally owned water plants; electric light and power companies, four percent on sales and demand charges for domestic purposes and commercial lighting and a four percent on sales and demand charges for all other purposes, except as to income received by municipally owned plants producing or purchasing electricity and distributing same: *Provided*, That electric light and power companies which engage in the supplying of public service but which do not generate or produce electric power shall be taxed on the gross income derived therefrom at the rate of three percent on sales and demand charges for domestic purposes and commercial lighting and three percent on sales and demand charges for all other purposes, except as to income received by municipally owned plants: *Provided, however*, That the sale of electric power under this section shall be taxed at the rate of two and forty-six hundredths percent on that portion of the gross proceeds derived from the sale of electric power to a plant location of a customer engaged in a manufacturing activity, if the contract demand at such plant location exceeds two hundred thousand kilowatts per hour per year, or if the usage at such plant location exceeds two hundred thousand kilowatts per hour in a year; natural gas companies, four and twenty-nine hundredths percent on the gross income; toll bridge companies, four and twenty-nine hundredths percent; and upon all other public service or utility business, two and eighty-six hundredths percent. The measure of this tax shall not include gross income derived from commerce between this state and other states of the

United States or between this state and foreign countries. The measure of the tax under this section shall include only gross income received from the supplying of public services. The gross income of the taxpayer from any other activity shall be included in the measure of the tax imposed upon the appropriate section or sections of this article.

§ 11-13-2k. Banking and other financial business; legislative findings.

Upon every person engaging or continuing within this state in the business of banking or financial business, from and after the first day of April, one thousand nine hundred seventy-one, the tax shall be equal to one and fifteen one-hundredths percent of the gross income received from interest, premiums, discounts, dividends, service fees or charges, commissions, fines, rents from real or tangible personal property, however denominated, royalties, charges for bookkeeping or data processing, receipts from check sales, charges or fees, and receipts from the sale of tangible personal property: *Provided*, That gross income shall not include (a) interest received on the obligations of the United States, its agencies and instrumentalities, (b) interest received on the obligations of this or any other state, territory or possession of the United States, or any political subdivision of any of the foregoing or of the District of Columbia, or (c) interest received on investments or loans primarily secured by first mortgages or deeds of trust on residential property occupied by nontransients: *Provided, however*, That all interest derived on activities exempt under (c) above, shall be reported, as to amounts, on the return of a person taxable under the provisions of this section.

Persons taxed pursuant to the provisions of this section shall not be taxed under sections two-a to two-j, inclusive, or sections two-l or two-m of this article.

The Legislature hereby finds and declares that it is the intent of the Legislature to subject national banking associations and other financial organizations to the tax imposed by this article, in accordance with the authorization contained in section five thousand two hundred nineteen of the revised statutes of the United States as amended by Public Law 91-156 enacted the twenty-fourth day of December, one thousand nine hundred sixty-nine.

§ 11-13-2m. Business of generating or producing electric power; exception; rates.

(1) Upon every person engaging or continuing within this state in the business of generating or producing electric power for sale, profit or commercial use, either directly or through the activity of others, in whole or in part, when the sale thereof is not subject to tax under section two-d of this article, the amount of the tax to be equal to the value of the electric power, as shown by the gross proceeds derived from the sale thereof by the generator or producer of the same multiplied by a rate of four percent, except that the rate shall be two and forty-six hundredths percent on that portion of the gross proceeds derived from the sale of electric power to a plant location of a customer engaged in a manufacturing activity, if the contract demand at such plant location exceeds two hundred thousand kilowatts per hour per year, or if the usage at such plant location exceeds two hundred thousand kilowatts per hour in a year.

(2) The measure of this tax shall be the value of all electric power generated or produced in this state for sale, profit or commercial use, regardless of the place of sale or the fact that transmission may be to points outside this state: *Provided*, That the gross income received by municipally owned plants generating or producing electricity shall not be subject to tax under this article.

§ 11-13-3b. Definitions; reduction allowed in tax due; how computed.

When used in this section, the phrase "normal tax" shall mean the tax computed by the application of rates against values or gross income as set forth in sections two-a to two-m, inclusive, of this article, less exemption at the rate of fifty dollars annually or at the rate of four dollars and sixteen cents per month for the period actually engaged in business.

The normal tax shall be computed by the application of rates against values or gross income as set forth in sections two-a to two-m, inclusive, of this article.

§ 11-13-25. Cities, towns or villages restricted from imposing additional tax.

Notwithstanding the provisions of section five, article thirteen, chapter eight of this code, no city, town or village shall impose a business and occupation tax:

(a) Upon occupations or privileges taxed under sections two-a, two-b, two-c, two-d, two-e, two-g, two-h, two-i and two-j of this article, in excess of rates in effect under this article on January one, one thousand nine hundred fifty-nine;

(b) Upon occupations or privileges taxed under section two-k of this article, in excess of one percent of gross income;

(c) Under section two-l of this article; or

(d) Upon occupations or privileges taxed under section two-m of this article, in excess of the tax rate applicable to such occupations or privileges under section two-b of this article on January one, one thousand nine hundred fifty-nine.

ARTICLE 13C. BUSINESS AND OCCUPATION TAX CREDIT FOR INDUSTRIAL EXPANSION.

§ 11-13C-2. Meaning of terms; "industrial taxpayer" defined.

(a) Any term used in this article shall have the same meaning as when used in comparable context in article thirteen of this chapter, unless a different meaning is clearly required by the context or by definition in this article.

(b) The term "industrial taxpayer" when used in this article shall mean any person liable for tax under article thirteen of this chapter exercising any of the following privileges:

(1) Any privilege taxable under section two-b or two-m of article thirteen of this chapter.

(2) Any privilege taxable under section two-h of article thirteen of this chapter: *Provided,* That such privilege is manufacturing for another, which privilege would be taxable under section two-b or two-m of article thirteen of this chapter if title to the raw materials involved in the manufacturing process were vested in the taxpayer exercising the privilege taxable under section two-h of article thirteen of this chapter.